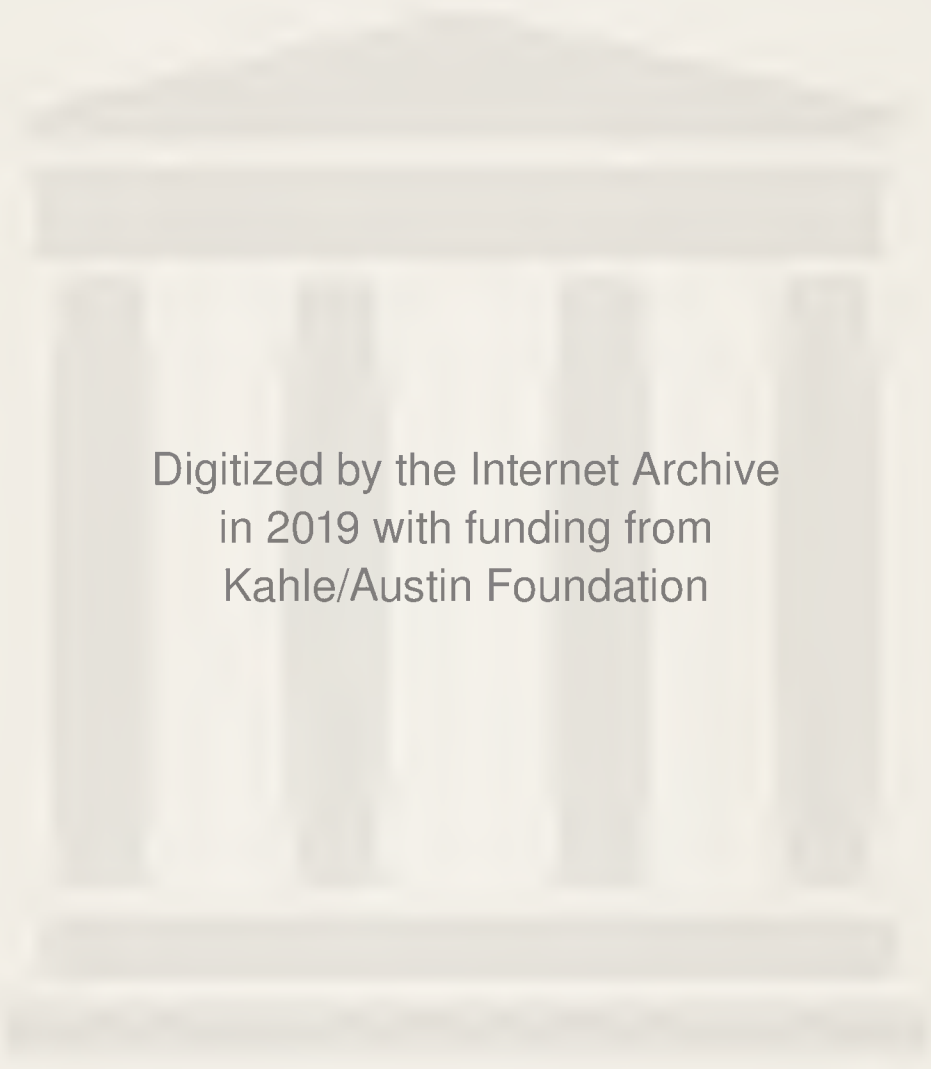
NUNC COGNOSCO EX PARTE

TRENT UNIVERSITY
LIBRARY


Digitized by the Internet Archive
in 2019 with funding from
Kahle/Austin Foundation

https://archive.org/details/britishyearbooko0042unse

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 1967

FORTY-SECOND YEAR OF ISSUE

Issued under the auspices of the
Royal Institute of International Affairs

OXFORD UNIVERSITY PRESS
LONDON NEW YORK TORONTO
1969

JX 21 .B7 v. 42 1967

Oxford University Press, Ely House, London W. 1

GLASGOW NEW YORK TORONTO MELBOURNE WELLINGTON
CAPE TOWN SALISBURY IBADAN NAIROBI LUSAKA ADDIS ABABA
BOMBAY CALCUTTA MADRAS KARACHI LAHORE DACCA
KUALA LUMPUR SINGAPORE HONG KONG TOKYO

© ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS 1969

PRINTED IN GREAT BRITAIN

Editors

PROFESSOR SIR HUMPHREY WALDOCK
PROFESSOR R. Y. JENNINGS

Editorial Committee

SIR GERALD FITZMAURICE (Chairman)
DR. M. E. BATHURST
DR. DEREK BOWETT
DR. IAN BROWNLIE
DR. G. C. CHESHIRE
J. E. S. FAWCETT
PROFESSOR R. GRAVESON
DR. C. W. JENKS
PROFESSOR D. H. N. JOHNSON
E. LAUTERPACHT
PROFESSOR IAIN MacGIBBON
LORD McNAIR
DR. F. A. MANN
DR. J. H. C. MORRIS
THE RIGHT HON. P. J. NOEL-BAKER
DR. C. PARRY
DR. KENNETH SIMMONDS
SIR FRANCIS VALLAT
LORD WILBERFORCE
PROFESSOR B. A. WORTLEY

Editorial Communications should be addressed as follows:

Articles and Notes:
PROFESSOR R. Y. JENNINGS
JESUS COLLEGE, CAMBRIDGE

Books for Review:
DR. IAN BROWNLIE
WADHAM COLLEGE, OXFORD

Other Communications:
THE SECRETARY
THE BRITISH YEAR BOOK OF INTERNATIONAL LAW
ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS
CHATHAM HOUSE
10 ST. JAMES'S SQUARE, LONDON, S.W. 1

The Editors, the members of the Editorial Committee, and the Royal Institute of International Affairs do not make themselves in any way responsible for the views expressed by contributors, whether the contributions are signed or not.

125165

CONTENTS

STATE CONTRACTS AND INTERNATIONAL ARBITRATION
By Dr. F. A. Mann 1

THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES AND SOME QUESTIONS OF THE LAW OF TREATIES
By Dr. P. Weis 39

A *CAUSE CÉLÈBRE* IN THE HISTORY OF TREATY-MAKING: THE REFUSAL TO RATIFY THE PEACE TREATY OF REGENSBURG IN 1630
By Professor D. P. O'Connell 71

BUDGET APPROVAL BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS: DUTY OR DISCRETION?
By T. Meron 91

THE JUSTICIABILITY OF DISPUTES AND ISSUES IN INTERNATIONAL RELATIONS
By Dr. Ian Brownlie 123

INTERNATIONAL CORPORATIONS AND NATIONAL LAW
By Dr. F. A. Mann 145

ENFORCEMENT ACTION BY REGIONAL AGENCIES, WITH SPECIAL REFERENCE TO THE ORGANIZATION OF AMERICAN STATES
By Dr. Michael Akehurst 175

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL AND INTERNATIONAL LAW
By J. E. S. Fawcett 229

NOTES:
Proof of Foreign Law: Scrutiny of its Constitutionality and Validity. *By* Dr. K. Lipstein 265
Crimes Committed on Board Aircraft: Tokyo Convention Act 1967. *By* A. Samuels 271
The Outer Space Treaty. *By* H. G. Darwin 278

DECISIONS OF BRITISH COURTS DURING 1967 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW:
A. *Public International Law*, *By* Dr. Ian Brownlie 291
B. *Private International Law*. *By* P. B. Carter 298

DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1967:
By Dr. Michael Akehurst 311

REVIEWS OF BOOKS:

Académie de Droit International de la Haye: Recueil des cours, 1963, vol. 110; 1964, vol. 112; 1964, vol. 113. 325

Académie de Droit International de la Haye: Recueil des cours, 1965, vol. 114; 1965, vol. 115; 1965, vol. 116. 327

British International Law Cases, vol. 6. British Institute Studies in International and Comparative Law. 328

Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium'. Publications of the European Court of Human Rights. 329

Alexandrowicz, C. H.: *An Introduction to the History of the Law of Nations in the East Indies* 329

Alexandrowicz, C. H. (Editor): *The Indian Year Book of International Affairs, 1964*; vol. xiii, part ii 331

Brownlie, Ian: *Principles of Public International Law* 333

Brownlie, Ian (Editor): *Basic Documents in International Law* 333

Colin, J.-P.: *Le Gouvernement des juges dans les Communautés Européennes* 337

Conrad, H., Jahrreiss, H., Mikat, P., Mosler, H., Nipperdey, H. C., Salzweder, J. (Editors): *Gedächtnisschrift Hans Peters* 339

Delaume, G. R.: *Legal Aspects of International Lending and Economic Development Financing* 340

Detter, Ingrid: *Essays on the Law of Treaties* 342

Kirdar, Ü.: *The Structure of United Nations Economic Aid to Underdeveloped Countries* 343

Lillich, R. B.: *International Claims: Postwar British Practice* 345

O'Connell, D. P. (Editor): *International Law in Australia* 348

Sandifer, D. V., and Scheman, L. R.: *The Foundations of Freedom: The Interrelationship between Democracy and Human Rights* 351

Sørensen, M.: *Manual of Public International Law* 352

Teclaff, L. A.: *The River Basin in History and Law* 356

Tizzano, A.: *La Corte di Giustizia della Communità Europea* 357

Agrawala, S. K.: *International Law: Indian Courts and Legislature* 358

Schwarzenberger, G.: *A Manual of International Law* 360

TABLE OF CASES 365

INDEX 369

STATE CONTRACTS AND INTERNATIONAL ARBITRATION*

By F. A. MANN[1]

THERE are three types of international arbitration arising from contractual obligations,[2] namely arbitration between States (or other international persons); arbitration 'between parties subject respectively to the jurisdiction of different contracting States';[3] and arbitrations between States and private persons of foreign nationality or residence.

The purpose of the present contribution is to investigate the peculiarities of the last-mentioned type of arbitration. However, in order to define and to comment upon these peculiarities, it is necessary to view them against the background of the other two types of arbitration; hence, by way of introduction, these will shortly be discussed.

I

Arbitration between States under treaties concluded by them is almost invariably regulated by the *compromis*. Even where there exists an earlier treaty providing for the submission of future disputes to arbitration, it cannot usually be given effect without a further special agreement or *compromis* 'to define the question to be referred to arbitration and the method by which the tribunal is to be constituted',[4] as well as any other point of practice that may have to be settled. Thus the *compromis* frequently deals with the procedure to be followed, the law to be applied and the publication of the award to be rendered by the arbitrators. The details included in the *compromis* vary considerably, but the broad terms are now fairly well established.[5] The Hague Convention of 1907 establishing the Permanent Court of Arbitration[6] and the Model Rules on Arbitral

* © Dr. F. A. Mann, 1968.

[1] LL.D. (London), Dr. Jur. (Berlin); Honorary Professor, University of Bonn; Solicitor (London).

[2] There is a fourth type, namely arbitration set up by a treaty between States, to which private parties are or may be parties and which is intended to settle private disputes of all kinds and by no means arising from contract only. The most prominent examples are the Mixed Arbitral Tribunals created by the treaties of peace after the First World War. A more recent example is the Arbitral Commission on Property Rights or Interests in Germany set up under the Convention on the Settlement of Matters Arising out of the War and the Occupation (Cmd. 9368, p. 104), which by Art. 8 is expressly instructed to 'apply the general principles of international law and of justice and equity'. These arbitrations, on which see Hallier, *Völkerrechtliche Schiedsinstanzen für Einzelpersonen und ihr Verhältnis zur innerstaatlichen Gerichtsbarkeit* (1964), are arbitrations under public international law. They are disregarded in the present context. While they are founded on treaties, they do not arise from treaties or contracts between States made for the purpose of settling their own disputes, as opposed to those of their nationals.

[3] See the definition in paragraph 1 of the Geneva Protocol of 1923.

[4] Simpson and Fox, *International Arbitration* (1959), pp. 44–5.

[5] For a model draft see Carlston, *American Journal of International Law*, 47 (1953), pp. 203 et seq.

[6] See Oppenheim, *International Law* (7th ed., by Lauterpacht, 1952), vol. 2, pp. 36 et seq.

Procedure adopted in 1958 by the International Law Commission[1] in many respects point the way.

Though there is no compelling reason of principle or logic why in a given case States should not decide upon arbitration under the law of a particular State, it has so far been the uniform practice to divorce arbitration between States entirely from any system of municipal law, and to submit it to public international law. This seems to be generally accepted or assumed, but is hardly ever stated in express terms. The tribunal cannot help, of course, having its seat and its hearings in national territory, and this probably presupposes the consent of such territory's sovereign.[2] But his law does not reach the arbitration between States. Thus the arbitration will follow its own procedural rules, whether they are laid down in the *compromis* or derived from a multilateral Convention such as the Hague Convention of 1907 or from general international law. It follows that the arbitrators may be at liberty to hear witnesses on oath even where the *lex loci* precludes arbitrators from administering oaths.[3] Or, to take another example, the award is not subject to the requirement, known to many systems of municipal law, according to which it must be deposited with the local court.[4] Or if an arbitration under international law takes place in England the Arbitration Act 1950 does not apply to it, so that, for instance, the High Court of Justice cannot exercise the supervisory powers normally vested in it. The exemption cannot be deduced from the terms of the Act. It rests on the broad ground that arbitrations between States are outside the jurisdiction of the territorial sovereign. Those who prefer a narrower and more technical ground will invoke the well-established, though ill-documented, rule according to which arbitrators appointed under a *compromis* are immune from judicial process in the country in which they exercise their official functions.[5]

Similarly, the law applicable in arbitrations between States is almost always, though perhaps not necessarily,[6] international law. It has been held[7]

[1] *Yearbook of the International Law Commission* (1958–II), p. 81.

[2] The point is not covered by authority, but would seem to follow from general principles.

[3] As it does, for instance, in Germany: s. 1035 of the *Code of Civil Procedure*.

[4] Where one party requests it, this is the position, for instance, in Zurich: s. 368 of the *Rules of Civil Procedure*.

[5] See Art. 46 of the Hague Convention of 1907 and Simpson and Fox, op. cit. (above, p. 1, n. 4), at p. 102.

[6] There may be exceptional cases in which contracts between States are governed by a municipal system of law and have thus been 'commercialized': see Mann, this *Year Book*, 21 (1944), p. 11 and 35 (1959), p. 34.

[7] In the case of the *Diverted Cargoes* between the United Kingdom and Greece, I.L.R. (1955), p. 820, the sole Arbitrator, Monsieur Cassin, held that in the absence of any express provision he had to decide 'on the basis of respect for law' as required by Art. 37 of the Hague Convention of 1907 and that this meant international law. See the much more explicit Arts. X and XI of the Model Rules on Arbitral Procedure referred to above, n. 1.

and suggested[1] that international law applies even in the absence of a clause to such effect in the *compromis*. The fact that a rule of the local law has the character of *ordre public* is, accordingly, without relevance.

Next, there is the question whether the award rendered by international arbitrators in pursuance of the *compromis* is enforceable,[2] not only by such methods as public international law permits, but also in the manner of a municipal award. Suppose a treaty provides for the sale by the United Kingdom of aircraft to Denmark[3] and arbitrators have awarded to Denmark a large sum of money as damages for the defective quality of the engines. Suppose, further, that the United Kindom fails to pay. Could Denmark bring an action in the English courts founded upon the award? Could the successful State obtain in the courts of third countries, such as Belgium, the *exequatur* to the award? The question has not arisen in practice.[4] It would seem, in general, to demand an answer in the negative,[5] for the awards which the rule of municipal law envisages are, it is submitted, normally awards made in, or under the sovereignty of, foreign States. As a matter of construction, awards made under international law by virtue of a *compromis* between States will only rarely be within the contemplation of municipal provisions relating to the enforcement of (domestic or foreign) awards.[6]

Finally, there is clear and convincing authority for the proposition that arbitration proceedings between States cannot attract the international responsibility of the State in the territory of which they take place.[7]

[1] Carlston, *The Process of International Arbitration* (1946), p. 140; Simpson and Fox, op. cit. (above, p. 1, n. 4), at pp. 128–30.

[2] A very similar question relates to the setting aside, the annulment or revision of award.

[3] Cf. Cmd. 7660.

[4] It did not arise in the case of *Société Commerciale de Belgique* v. *Greece*, *Revue critique de droit international privé* (1952), p. 111, also I.L.R. (1951), p. 3, for in that case the application to the Belgian Court was made by virtue of an award obtained by the applicant, a private person, in arbitration proceedings against Greece. The fact that, in proceedings between Belgium and Greece, the Permanent Court of International Justice had held that award to be binding (Ser. A/B, No. 78) was of little legal relevance. The Permanent Court's judgment is one of the most confusing and confused decisions rendered by it: see Verzijl, *The Jurisprudence of the World Court* (1965), vol. 1, p. 584. On the Belgian decision see Rosenne, *The International Court of Justice* (1957), pp. 85–9, whose criticism appears unjustified, and Schachter, *American Journal of International Law*, 54 (1960), pp. 12–14.

[5] C. Wilfred Jenks, *The Prospect of International Adjudication* (1964) devotes chapter 12 to 'Methods of Securing Compliance with International Decisions and Awards' (p. 663). He seems to envisage decisions rendered in proceedings between States (or other international persons). It would seem from pp. 706 et seq. that the learned author differs from the view expressed in the text, and would, accordingly, consider it possible to enforce a truly international award in a municipal court. He says of the Belgian case referred to in the preceding note that it 'represents a constructive approach' (p. 706). Since the case has no bearing upon the type of award under discussion in the text, it is possible that Dr. Jenks gives to the term 'International Decisions and Awards' a wider meaning so as to include the problems discussed in Section III, below.

[6] See Mann, *Transactions of the Grotius Society*, 44 (1958–9), p. 57.

[7] See the decision in *Salem*'s case, *Annual Digest*, 1931–2, Case No. 98 and the decision of the European Commission for Human Rights at Strasbourg (*Yearbook of the European Convention on Human Rights*, vol. 2, p. 256, also I.L.R., 25 (1958), p. 190) where the Supreme Restitution

Just as the Netherlands cannot be held responsible for the activities of the International Court of Justice, so it has no responsibility for the Permanent Court of Arbitration when it decides disputes between States. This is another consequence of the fact that, although the local sovereign's consent to the setting up of the tribunal in his territory is necessary he has no control over its activities; the purely negative control which he could exercise by revoking his consent, is insufficient to support the affirmative conclusion that he has control and therefore incurs responsibility.

II

Arbitration under a contract between two private persons resident in different States is in every respect the very antithesis of the arbitration between States which was surveyed in the preceding section. In particular, such arbitration is altogether subject to a municipal system of law, namely the legal system of the country in which the tribunal has its seat. This *lex arbitri*, this *loi de l'arbitrage* determines all questions of procedure as well as of private international law. Although many laws allow much freedom of choice to the parties or the arbitrators, it is always the *lex arbitri* in the above sense that decides whether and to what extent such freedom exists.[1] In order to illustrate these principles it may be helpful, by way of example, to refer again to the question of arbitration taking the evidence of witnesses on oath. It would be quite wrong to make a general statement such as this: arbitrators are entitled to regulate procedure and therefore they decide whether witnesses can be heard on oath. The law differs from country to country. Hence no general statement is possible. The first task is to find the *lex arbitri*. This is the law of the tribunal's seat. The *lex arbitri* so identified provides the solution: perhaps it says that arbitrators cannot administer oaths at all; perhaps it allows the parties to regulate the procedure, and includes the question of sworn evidence among the matters subject to the parties' decision; perhaps it gives these powers to the arbitrators. It is always the *lex arbitri* which, primarily, regulates procedure.

These views which may claim to be supported, in substance, by traditional thought as well as by reasons of principle and sound legal policy, have in recent years been challenged by several scholars who aim at the 'internationalization' of international commercial arbitrations.[2] Perhaps

Court at Nürnberg was held not to be subject to German jurisdiction. Neither of these cases arose from an arbitration between States, but the principles laid down in them have general validity, though their application to the facts of the latter case give rise to doubt. See, e.g., Vasak, *La Convention européenne des Droits de l'Homme* (Paris, 1964), pp. 100–3.

[1] These views are more fully developed by Mann, 'Lex Facit Arbitrum, in International Arbitration', *Liber Amicorum for Martin Domke* (1967), p. 157.

[2] See, in particular, Goldman, 'Les Conflits de lois dans l'arbitrage international de droit privé, *Recueil des cours*, 109 (1963–II), p. 351; Fouchard, *L'Arbitrage commercial international* (1965).

this method of approach is most concisely represented by Professor Fragistas.[1] According to him, it is open to the parties to an international arbitration by their contract to detach the arbitration from every municipal system of law so as to render it 'supranational' and to submit it to public international law.

> L'arbitrage supranational doit donc être un arbitrage international, c'est-à-dire un arbitrage qui échappe à l'emprise de tout droit national pour être soumis directement au droit international.

There are, so the learned author recognizes, difficulties in application, but they will be overcome by reference to the general principles of law which govern all questions of procedure, private international and substantive law. The difficulties have to be overcome, for 'l'arbitrage privé supranational est un fait social, une réalité que l'on ne peut pas méconnaître'. The parties' wish to 's'élever au dessus de tout ordre étatique' is particularly pronounced in the case of arbitrations subject to the rules of the International Chamber of Commerce. Where these rules apply, 'les parties ont l'impression de soumettre leur litige à un arbitrage qui se trouve au dessus de tout ordre étatique'. An author who seems to have been the first to suggest that certain contracts to which a private person is a party may be 'internationalized'[2] has the particularly clear duty to state unequivocally that a theory such as that propagated by Professor Fragistas is unacceptable, undesirable and legally unjustifiable.

First, the parties' wishes and impressions are irrelevant and should be left out of account. Nor can it be admitted that there is any cogent evidence of 'arbitrage supranational' being a social fact. It is true that certain awards, made under the auspices of the International Chamber of Commerce, have been referred to as evidence of a tendency to detach arbitrations from municipal legal systems.[3] But the authors of these awards are unknown. There is room for the impression that such awards may involve a violation rather than a progressive application of the law. Finally, it is a matter of speculation whether in given cases the 'supranational award' has satisfied or disappointed the parties.

Secondly, there is in law no basis whatever for the application of public international law, of general principles of law or of some odd systems of discretion, frequently honoured by the name of 'equity', except upon the basis of a municipal system of law which permits the control of such rules in all or some respects. No municipal system of law is known that includes

[1] *Revue critique de droit international privé* (1960), p. 1, at pp. 14–17

[2] This *Year Book*, 21 (1944), p. 11, at p. 19. It was made clear that the extension of that doctrine to contracts between private persons was not contemplated and could not be defended: see, e.g., ibid., 35 (1959), 34, at p. 46.

[3] They are discussed by Fouchard, op. cit., above, p. 4, n. 2.

a permissive rule to that effect, where the arbitration arises between two private persons.

Thirdly, the proposed 'internationalization' of arbitrations between private persons would be liable to become the source of grave political and social dangers and must, for this reason alone, be firmly rejected. The supranational arbitration which Professor Fragistas advocates for use between private persons would not in any way differ from the arbitration between States, which the *compromis* usually submits to public international law. Private persons, however, cannot and should not enjoy the privileges open to, or be exposed to the risks accepted by, States.

III

International arbitrations[1] arising from a contract between a State and an alien do not, by definition, come within either of the categories discussed in the preceding sections. Should they be equiparated to arbitrations between States, which are subject to public international law? Or should they be put on the same level as arbitrations between two private persons, which are subject to the *lex arbitri*, i.e. the municipal law prevailing at the tribunal's seat?

1. It is submitted that, in principle, it is the latter question that requires an affirmative answer. This, as has been pointed out, does not mean that it is impossible for the *lex arbitri*, to the extent and for the purposes determined by it alone, to allow the application of rules created by the parties themselves or of another legal system, including possibly public international law, to which they may refer. Accordingly, the problem of international arbitration cannot be discussed except against the background of a given *lex arbitri;* the legal systems of the world differ so considerably that no general rule can, or is intended to, be put forward. It follows that, in principle and always subject to such freedom of choice as it may allow, the *lex arbitri* governs the validity and effect of the submission; the constitution of the tribunal; the procedure; the law applicable by the arbitrators; the making, publication, interpretation, annulment and revision of the award; and, where this arises for purposes of enforcement, the nationality of the award, for this has necessarily a national character and does not constitute an instrument created by public international law. It may well be that in many State contracts 'there is evidence of the intention that arbitration is to be "international", in the sense that it is not to be conducted under the laws of any of the States directly related to the

[1] Two points should be made clear. First, there are arbitrations between a State and an alien which take place within the territory of the State concerned. These are not international arbitrations within such meaning as is usual or is employed here. Secondly, arbitration is not the same thing or is not always subject to the same law as the contract from which it arises. This study is concerned with arbitration only.

transaction'.[1] But this intention does not in any way deprive the arbitration of its municipal character. Nor is that intention expressed merely by provisions relating to the appointment of the arbitrations or the umpire.[2] It can be carried into effect only by express or implied provisions sanctioned by the law of the tribunal's seat. Finally, the country of the arbitration tribunal's seat supplies the *lex arbitri* even in those cases in which the agreement is made between an international organization and a private person and stipulates for the arbitration to take place in the premises of the international organization. Such premises are not 'extraterritorial'[3] and the Headquarters Agreements which usually cover them do not, for the purposes material to the present discussion, confer 'extraterritoriality' upon them. Thus the Agreement of 21 November 1947 between the United States of America and the United Nations Organization expressly provides that in general 'the federal, state and local law of the United States shall apply within the headquarters district'.[4] Accordingly, an arbitration between the United Nations Organization and a New York building contractor will be a New York arbitration even if, pursuant to the agreement, it takes place in the United Nations building.

The fundamental approach which is thus suggested and the detailed implications of which will have to be considered is exemplified by numerous cases of arbitrations between States and private persons occurring in almost daily practice. Yet it has not always been followed, although it is possible that deviations from it have occasionally sprung from inexact terminology or have for other reasons been unguarded rather than deliberate. There is, for instance, a series of awards[5] which, in disputes between a State and a private person, were made under a municipal system of law, but as they are reported in publications normally devoted to public international law and as they are frequently referred to in the context of the peaceful settlement of disputes with States, they have been misunderstood and treated as if they were awards made under public international law. One of the earliest and clearest examples is the award made in London in the case of *Lena Goldfields Ltd.* v. *Soviet Government*.[6] With

[1] Spofford, *Recueil des cours*, 113 (1964–III), p. 182.
[2] Spofford, ibid.
[3] See, in particular, Brandon, this *Year Book*, 28 (1951), p. 96.
[4] Section 7.
[5] Nussbaum, 'The Arbitration between the Lena Goldfields Ltd. and the Soviet Government', *Cornell Law Quarterly*, 36 (1950–I), p. 31, where the Award is printed in full; *Radio Corporation of America* v. *The National Government of the Republic of China*, *Reports of International Arbitral Awards*, vol. 3. p. 1623; *The Administration of Posts and Telegraphs of the Republic of Czechoslovakia* v. *Radio Corporation of America*, *American Journal of International Law* (1936), p. 523; *Petroleum Developments (Trucial Coast) Ltd.* v. *The Ruler of Abu Dhabi*, *International and Comparative Law Quarterly* (1952), p. 247. On these and the other cases to be mentioned in the text see this *Year Book*, 35 (1959), pp. 54–6.
[6] See the preceding note; it is difficult to understand how Friedmann, *The Changing Structure of International Law* (1964), p. 146, comes to suggest that the case is derived 'from the Mixed Claims Commissions constituted after the first world war'.

some hesitation the late Sir Hersch Lauterpacht published it in the *Annual Digest of Public International Law Cases*.[1] The arbitration arose from a Concession Agreement made between the Soviet Government and Lena Goldfields Ltd. Its terms have never been published in full. The *lex arbitri*, it is submitted, was clearly English, so that the English Arbitration Act, English procedure and English private international law applied, and the arbitration was not subject to public international law. It may well be that the law which the arbitrators were instructed, or decided, to apply was, at any rate in part, public international law.[2] But this is the effect of the English conflict of laws which applied on account of the *lex arbitri* being English. It does not mean that the arbitration arose under or was subject to public international law: the fact that an English judge or arbitrator has to apply Italian law leaves him in all other respects subject to English law.

A more recent example which is sometimes put forward as an international case[3] but which should never have been published, is the case of *Alsing Trading Co.* v. *Greece*.[4] It arose from a concession made under Greek law.[5] Arbitration was held in Lausanne.[6] No question of public international law arose or should be read into the award. It was an arbitration on the footing of municipal law between a State and a private person, such as merits no comment. It should, perhaps, be added that contracts made between a private person and a corporation wholly owned by a foreign State[7] are even less problematical.

The preceding submissions do not require any qualification where the contract is a concession. It has sometimes been argued that a concession is a contract under public or administrative law and cannot therefore be put on a par with an ordinary commercial contract. Whether this is a valid and material distinction depends on the proper law applicable in a given case. Even if a concession is a *contrat administratif* it is still a contract under municipal law. Neither it nor any arbitration flowing from it belongs to the realm of public international law. It is, therefore, difficult to understand the precise point which Professor Friedmann has in mind, when, introducing a lengthy discussion of the nature of international concession

[1] 1929–30, p. 428.

[2] See the article referred to above, p. 7, n. 5, and Lord McNair, this *Year Book*, 31 (1954), p. 10.

[3] It is, however, quite clear that the umpire made no such mistake. In particular, he held that the award was subject to the law of the Canton of Vaud. The contract was subject to Greek law with ample references to comparative material.

[4] I.L.R. (1956), p. 633. [5] Ibid., p. 637. [6] Ibid., pp. 638–9.

[7] This was the position in the case of *Sapphire International Petroleum Ltd.* v. *National Iranian Oil*, I.L.R., vol. 35, p. 136, on which see J. F. Lalive, *Annuaire suisse de droit international* (1962), p. 273; and Suratgar, *Columbia Journal of International Law*, 3 (1965), p. 152. The arbitrator correctly treated the arbitration as being subject to Swiss law, this being the *lex arbitri*.

agreements, he refers to the 'often bitter debate' on the question 'whether concession agreements made between the government controlling the resources to be exploited by the concession and the foreign party should be treated as genuine civil contracts or whether, on the other hand, the right to terminate such agreement at any time should be regarded as a non-negotiable aspect of the power and duty of governments to serve the social and economic welfare of their peoples by the exercise of their sovereign legislative and administrative powers'.[1] This is not a matter on which international law has any contribution to make; nor is it a question which can possibly be put in general terms, without reference to a specific system of municipal law. The classification, and the consequences flowing from it, are determined by the proper law of the contract. Here as elsewhere propositions of great width are unlikely to be helpful. Nor is any legally relevant point made by the suggestion that a particular contract or concession has the character of an 'economic development agreement'.[2] This is not a conception which, for present purposes, the law recognizes or finds useful. Even if it were accepted as a descriptive term, it would have no effect upon the control of municipal law, though, let it be repeated, the conflict rules of the *lex arbitri* may permit or require the application of public international law as the law chosen by the parties for their contract, however this may be described.

If one leaves aside doctrinal misunderstandings there is room for the impression that there exists only one award which explicitly adopts the opposite view and does so on grounds that must be described as wholly unconvincing but which, happily, are entirely *obiter*. The award was made by the late Professor Sauser-Hall as umpire and by M. Hassan and M. Saba Habachi as arbitrators in the case of *Saudi Arabia* v. *Arabian American Oil Co.*[3] The dispute arose from a concession which, apparently, did not define the legal system controlling it, but by the submission the arbitrators were instructed to decide the dispute in accordance with Saudi Arabian law, in so far as matters within the jurisdiction of Saudi Arabia were concerned, and, in regard to other matters, in accordance with the law deemed by the arbitrators to be applicable. The concession provided for arbitration at the Hague, but later the parties agreed that the seat of the tribunal should be at Geneva. In the course of a discussion of 'the law to be applied', but without explaining the relevance of its observations[4] the tribunal made the following statement:

[1] *The Changing Structure of International Law* (1964), pp. 200 et seq.

[2] This is a description to which Suratgar unjustifiably attaches importance; see above, p. 8, n. 7.

[3] I.L.R., 27 (1963), p. 117. For a summary of the decision (without apparent disapproval of its character or reasoning) see Mme Bastid, *Annuaire français de droit international* (1961), p. 300.

[4] I.L.R., 27 (1963), p. 155. What difference would it have made if the tribunal had held that

Although the present arbitration was instituted, not between States, but between a State and a private American corporation, the Arbitration Tribunal is not of the opinion that the law of the country of its seat should be applied to the arbitration. The jurisdictional immunity of States (the principle *par in parem non habet jurisdictionem*) excludes the possibility, for the judicial authorities of the country of the seat, of exercising their right of supervision and interference in the arbitral proceedings which they have in certain cases. . . . The Courts of Geneva have applied the law of Geneva to arbitrations between foreign corporations which, in the *compromis*, had established the seat of their arbitration tribunal in Geneva. . . . The question of the applicability of Swiss law to an arbitration in Switzerland to which a foreign State is a party does not appear to have ever been decided by the Courts of Geneva or by Swiss Courts. Considering the jurisdictional immunity of foreign States, recognised by international law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceedings to which a sovereign State is a party could be subject to the law of another State. Any interference by the latter State would constitute an infringement of the prerogatives of the State which is a party to the arbitration. This would render illusory the award given in such circumstances. For these reasons the Tribunal finds that the law of Geneva cannot be applied to the present arbitration. It follows that the arbitration, as such, can only be governed by international law.

In the first place, it is obvious that the arbitrators could not, and probably did not intend, to decide finally the question whether and to what extent Swiss law applied to the arbitration. In case of need, this was a question for decision by the Swiss courts. Their jurisdiction could not be taken away or limited by the arbitrators. Secondly, the tribunal could not help being subject to the sovereignty, i.e. to the law, of the country where it was sitting. The arbitrators thought it right to suggest that any interference by Switzerland 'would constitute an infringement of the prerogatives of the State which is a party to the arbitration'. And what about 'an infringement of the prerogatives of the State' in which the arbitration, exempt from its jurisdiction, takes place? Had Switzerland given its consent to an arbitration proceeding in its territory which was subject to international law and which, therefore, Swiss law could not reach? Thirdly, the arbitrators assumed without discussion that the principle of immunity applied to a contract and an arbitration of the type they were concerned with. In truth, it is almost certain that in Switzerland the principle does not comprise acts done *jure gestionis*. Fourthly, it is necessary to draw attention to the inadmissible consequences of the arbitrators' ruling. Perhaps reference may once again be made to the question of administering oaths to witnesses appearing before the arbitrators. Should Professor Sauser-Hall, M. Hassan and M. Saba Habachi be able to

the arbitration was subject to the law of Geneva? In other words, why was it necessary to make the observations which in part are referred to in the text? This is only one of the many points which establish that the award is a diffuse and poorly reasoned contribution of very little value. See this *Year Book*, 35 (1959), p. 48.

administer oaths in the face of an express prohibition by the law of Switzerland or Geneva? Moreover, would it really be in the interest of the parties if the award made by these arbitrators were an international award which, in all probability, could not be enforced in a municipal court?[1] Fifthly, and most significantly, it is submitted that the tribunal completely misunderstood the nature and effect of immunity. Let it be assumed that there may be circumstances in which in arbitration proceedings immunity may have a role to play[2]. Nevertheless, it is certain that, once a State has submitted to the jurisdiction of a judicial or arbitral tribunal, it has lost all its privileges; it is exposed to certain counterclaims, it has to provide security for costs, it has to pay costs when unsuccessful, it may become a respondent in an appeal, and so forth.[3] It is, therefore, plainly wrong to suggest that after submission to arbitration a State remains, within the framework of the same arbitration, entitled to any jurisdictional immunity. Hence, it is not surprising that the views expressed by the arbitrators in the present case are unique.[4] They are not reflected in any other case. They are, in particular, contrary to the arbitral practice in England,[5] where, as is well known, the doctrine of sovereign immunity has generally been allowed greater scope than in any other country.

If, in accordance with the preceding suggestions, an arbitration between a State and a private person, arising under a State contract, is subject to municipal law, then the award resulting from such arbitration has the 'nationality' of the country under whose law it is rendered, and can be enforced as such. In particular, it comes within the terms of any Convention which may apply to the international enforcement of such country's awards. The Geneva Protocol of 1923 extends to arbitration clauses agreed between 'parties, subject respectively to the jurisdiction of different contracting States'. Dr. Jenks has suggested[6] that in view of these terms the Protocol can 'have no direct application to an arbitration clause, one of the parties to which is an international body corporate which by definition is not subject to the jurisdiction of a contracting State'. A State which enters into an arbitration clause with a private person and becomes subject to arbitration under a municipal system of law may be said to have itself

[1] See above, p. 3.

[2] See below, p. 15.

[3] For these elementary propositions see, for instance, Oppenheim, *International Law*, vol. 1 (8th ed., 1955, by Lauterpacht), p. 266 and *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938). Or Dahm, *Völkerrecht*, vol. 1, p. 246.

[4] The only author who holds that the local law, i.e. the *lex arbitri* is inapplicable in the case of an arbitration between a State and a private person, seems to be Bourquin in Business Lawyer, 15 (1960) 860, at pp. 870–1. But although he relies on the jurisdictional immunity of States as his argument, he does not develop the point, or define the law which is applicable in substitution for the local law, or consider waiver.

[5] Above, n. 3 on this page.

[6] *The Proper Law of International Organisations* (1962), p. 246.

assumed the character of a private person and, therefore, to be under its own jurisdiction for the purpose of the Protocol of 1923. The broad policy pursued by the latter is such that there is no intrinsic reason why arbitration to which a State is a party should be excluded from its scope.

2. If an arbitration between a State and a private person is, irrespective of the nature of the contract, invariably and necessarily subject to the *lex arbitri*, i.e. a municipal system of law (though this may refer to or allow reference to some other law), there remains the question whether this principle also applies in the case of arbitration proceedings under the auspices of certain institutions.

No exception is possible where the parties avail themselves of the facilities offered by the International Chamber of Commerce.[1]

A problem of greater difficulty arises in the case of the Rules of Arbitration and Conciliation for Settlement of International Disputes between two parties of which only one is a State, elaborated in 1962 by the Permanent Court of Arbitration.[2] This organization was originally created for the pacific settlement of disputes between States. The Convention of 1907 provides[3] that 'the Bureau is authorised to place its office and staff at the disposal of the *Contracting Powers* for the use of any special Board of Arbitration'. This provision, one would have thought, contemplates disputes between 'contracting powers' only, but, as appears from Article 1 of the Rules of 1962, the Bureau considered that 'in case of arbitration in an international dispute between two parties of which only one is a State, the International Bureau of the Permanent Court of Arbitration. . . is authorised to place its premises and organisation at the disposal of the parties'.[4] This is a highly doubtful interpretation of Article 47, but up to a point it is an innocuous one, for nothing precludes a State and a private person from agreeing upon any set of rules of arbitration that appeals to them. The only question is whether by invoking the prima facie inapplicable Art. 47 of the Convention of 1907 the Bureau intends to impress the international character, which would clearly attach to proceedings between contracting powers, upon proceedings between a State and a private person. If this is the intention, it has not succeeded, for Article 47 certainly does not confer so far-reaching an authority. Arbitration proceedings under the Rules of 1962 would seem to be subject to Dutch law except that this may provide for another law to prevail. An award rendered as a result of such proceedings is a Dutch award and as such enforceable outside Holland.

[1] See on such cases Böckstiegel, *American Journal of International Law*, 59 (1965), p. 579.

[2] For the text see ibid., 57 (1963), p. 500. On the new Rules and their background see Schlochauer, *Archiv des Völkerrechts*, 12 (1964–5), p. 173, who at p. 187 prints the French text.

[3] Art. 47.

[4] See François, *Annuaire suisse de droit international*, 16 (1959), pp. 285, 289.

The legal position is different in the case of the Convention on the Settlement of Investment Disputes between States and nationals of other States which, under the auspices of the International Bank for Reconstruction and Development, was signed in March 1965, and has been ratified by numerous countries. This provides for the creation of the International Centre for Settlement of Investment Disputes between contracting States and nationals of other contracting States,[1] the high contracting parties having recognized, by virtue of the third recital, the benefits of 'international methods of settlement' in the case of such disputes. The Centre which lays down its own rules of procedure,[2] has 'full international legal personality' and enjoys the usual immunities.[3] So do the arbitrators and other persons engaged in the proceedings.[4] The award is not 'subject to any appeal or any other remedy except those provided for' in the Convention,[5] and is recognized and enforceable in each contracting State.[6] This, therefore, is a truly international tribunal which the contracting States have created for themselves and their nationals, which rests on a treaty and is 'self-contained', i.e. independent of any municipal law except in so far as concerns enforcement. Accordingly, in the United Kingdom the Arbitration (International Investment Disputes) Act, 1966 made special provision for the registration of Convention Awards,[7] but in addition it anticipated that an arbitration tribunal set up under the Convention might function in England. Therefore, it not only recognizes the immunities and privileges granted by the Convention,[8] but also declares that, subject to two exceptions, the Arbitration Act, 1950, 'shall not apply to proceedings pursuant to the Convention'.[9] The elimination of the English courts' supervisory powers over arbitration proceedings in England confirms the international character of arbitration under the Convention. This is even more clearly emphasized by the terms of the statute with which the United States of America ratified the Convention. It provides[10] that an award made by the Centre's arbitration tribunal 'shall create a right arising under a treaty of the United States'. It continues that 'the pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction in one of the several States' and that the Federal Arbitration Act shall not apply. An arbitration under the Convention is, therefore, the only one that

[1] Arts. 1 and 2. The text of the Convention is printed as a Schedule to the Arbitration (International Investment Disputes) Act, 1966.

[2] Art. 6.

[3] Arts. 18–20, 23, 24.

[4] Art. 21.

[5] Art. 53.

[6] Art. 54.

[7] Sections 1 and 2.

[8] Section 4.

[9] Section 3 (2).

[10] *International Legal Materials* (1966), vol. 5, p. 820.

renders a procedure under public international law available to a private person for the enforcement of a State contract, although, as a rule, this remains subject to a municipal system of law.[1]

At the same time, an award made in pursuance of the Convention is the only award made under public international law that is enforceable through the medium of municipal procedure. In addition, if it is made against a contracting State and remains unsatisfied, the State of which the successful party is a national is entitled to espouse its national's claim; this certainly applies to the claim arising under the municipal judgment into which the award has been converted and also applies to the award itself, for the provisions of Article 53 according to which an award is not subject 'to any appeal or any other remedy' cannot be read as excluding the possibility of diplomatic protection. The fact that this remains available does not necessitate the conclusion that the proceedings leading up to the award are not international in character.

3. At this point it becomes possible to end the discussion of the general principles governing international arbitration under State contracts and to turn to the peculiarities and to some of the specific problems to which such arbitration is likely to give rise.

(*a*) *The validity of the submission.* There are certain countries which render it unlawful for the State and its organs to submit to arbitration. This is so in France where articles 83 and 1009 of the Code of Civil Procedure provide that 'on ne peut compromettre . . . sur aucune des contestations' which concerns the State. It was until recently difficult in France to assess the significance of this prohibition in the realm of international arbitration. Is it without effect on the ground that it relates only to proceedings in France? Does it apply only where French law governs the contract? Or, on the contrary, is it perhaps a principle of *ordre public*? Or does it create an incapacity even on the part of the French State to submit to arbitration? It was only in 1966 that the Cour de Cassation finally answered these questions by its decision in the case of *Galakis*. In 1940 the French Admiralty chartered a Greek ship under a charter-party which provided for arbitration in London. This took place in 1953, when Galakis obtained an award against the French State. In 1954 it was declared enforceable in France and this decision was affirmed in 1966 on the ground that the prohibition 'ne soulève pas une question de capacité', that the rule was 'édictée pour les contrats internes' and that it was

[1] Art. 42. The Tribunal will decide 'in accordance with such rules of law as may be agreed between the parties'. In the absence of such agreement the law of the contracting State party to the dispute, including its conflict rules, shall apply together with 'such rules of international law as may be applicable'. The great significance of this provision cannot be discussed in the context of the present article. See, however, Delaume in *Clunet* (1966), pp 20–3, or (in English) *The International Lawyer*, 1 (1966), pp. 77–9.

inapplicable to 'un contrat international passé pour les besoins et dans les conditions conformes aux usages du commerce maritime'.[1]

It is to be hoped that this liberal decision will be followed wherever fetters similar to those prevailing in France are imposed upon the State's ability to submit to arbitration. But whether or not this is so depends primarily on the *lex arbitri*. If the arbitration takes place, for instance, in England and if already in the course of the arbitration, i.e. before the award, the respondent State invokes provisions such as those of the French Code of Civil Procedure, they afford a defence only if they invalidate the submission or impose an incapacity and if in either case the law of the respondent State governs. In deciding the question of the governing law and the classification, the arbitrators will follow the conflict rules of the *lex arbitri* or of the legal system to which the *lex arbitri* refers.

Normally, one would expect the arbitrators to pass upon any such problem in the course of the arbitration, though their decision cannot foreclose the right of review vested in the court of a country in which the award is enforced. The trouble which arose in the case of *Losinger & Cie* and which led to a dispute between Switzerland and Yugoslavia[2] was caused by the arbitrator's refusal to pronounce upon the effect of a Yugoslavian law according to which 'les procès contre l'État ne peuvent être intentés que devant les tribunaux réguliers de l'État'.[3] Instead, the arbitrator, M. Henri Thélin, suspended the arbitration and left to the parties 'le soin de soumettre cette question à l'autorité compétente'.[4] The precedent will not, it is hoped, be followed. It was the source of the trouble which eventually brought Switzerland and Yugoslavia before the Permanent Court of International Justice.

(*b*) *Immunity*. It has already been pointed out that once a State has submitted to arbitration it is, in regard to the conduct of the proceedings, in no different position from any other litigant. The problem of immunity arises only when it comes to enforcing (i) the submission agreement or (ii) the award against a recalcitrant State in a court of law outside the contracting State.

(i) It is usually assumed that in both respects the answer is supplied by the general law relating to immunity rather than any specific rules relating to international arbitration. As regards the enforcement of the submission in particular, in almost all countries except Britain and the Communist world this depends on whether the contract under which

[1] Cass. Civ., 2 May 1966, *Clunet* (1966), p. 648 with note by P. Level; see also Cass. Civ., 14 April 1964, *Clunet* (1965), p. 645 with note by Goldman.

[2] *P.C.I.J.*, 1938, Ser. C, No. 78 [3] For the text of the law see ibid, p. 118.

[4] See the award ibid., p. 116. The contract as a whole was subject to Yugoslavian law (p. 133). The arbitration was held in Switzerland, though in accordance with the arbitration clause the award was rendered in Yugoslavia (pp. 7–8).

it arises constitutes a private or commercial activity *jure gestionis* or a political or public act *jure imperii*. The latter is, the former is not, entitled to immunity. Accordingly, an arbitration arising from a charter-party between a private shipowner and a government for the transport of wheat is a commercial act, with the result that the courts of the *lex arbitri* are entitled to lend their assistance in procuring the constitution of the arbitration tribunal.[1] On this footing it only remains to define the State contracts which can be classified as commercial. According to the prevailing American practice[2] not only legislative, administrative and diplomatic acts, but also 'public loans' would be treated as public. Loans taken up and bonds issued by a State are, however, by their nature not different from those to which a private corporation is a party. Nor is their purpose necessarily different. Their form and legal structure are usually identical in both cases. Arbitration clauses may occur in both. It would be a great disservice to international investment if the lender of money to a State were told that in law he is participating in a transaction *jure imperii*.[3] It is quite true that according to the Supreme Court of the United States[4] Treasury Notes issued by the Republic of China were 'Sovereign obligations, *jure imperii* in form, of the highest public character'. But even if this was so in the case of Chinese Treasury Notes, it would be wrong to propound a principle of general application.

The problem is more doubtful in the case of concession agreements. These normally involve a grant made by the State in the exercise of its sovereign powers. Such an origin strongly points to the public character of concession agreements. Yet it will not always be decisive, for the agreement as a whole may disclose an intention to separate its content and operation from its origin, i.e. from the granting State's public law.

It is, however, submitted that within the context of the present discussion the character of the agreement as a commercial or public act is irrelevant and that, whether the agreement arises *jure imperii* or *jure gestionis*, the mere presence of an arbitration clause should be treated as an implied waiver of the plea of immunity.

In England, it is true, such a proposition is at present contrary to the law as laid down by the Court of Appeal in the unfortunate and unjust decision of *Kahan* v. *Federation of Pakistan*,[5] where the express submission in a contract to the jurisdiction of the English courts was denied effect on the ground that a waiver of immunity was invalid except if made

[1] *Victory Transport Inc.* v. *Comisaria General*, 336 F. 2d 354 (1964), also I.L.R., vol. 35, p. 110, a decision of the United States Court of Appeals, 2nd Circuit.

[2] See the dicta in the case mentioned in the preceding note.

[3] Cf. Delaume, *American Journal of Comparative Law*, 6 (1957), p. 189; *Columbia Journal of Transnational Law*, 3 (1964), p. 3.

[4] *National City Bank of New York* v. *Republic of China*, 348 U.S. 356 (1955).

[5] (1951), 2 K.B. 1003.

in facie curiae. This doctrine, which no doubt extends to arbitration clauses, has no basis in international law, as appears from the Optional Clause embodied in the Statute of the International Court of Justice;[1] when States 'declare that they recognise as compulsory, *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes', they enter only into an 'obligation', yet it has never been doubted that the declaration operates as a submission or as the actual waiver of the right to allege lack of jurisdiction. The law (not only the English system of equity) regards that as done which is agreed to be done. Thus, private persons who agree upon the exclusive jurisdiction of a particular court, waive the jurisdiction of any other tribunal and cannot escape by alleging the promissory character of their respective undertakings. Nor is there any other argument of logic, common sense or justice that supports the English practice.[2] It is open to the House of Lords to reject it, for even if, contrary to its plain meaning and effect,[3] *Duff Development Co.* v. *Kelantan*[4] had to be treated as an actual decision on the waiver implied in an arbitration clause, it would now be open to the House 'to depart from a previous decision when it appears right to do so'. It is possible, therefore, that even in Britain a better view may come to prevail.

But outside Britain there is no reason at all why a State should not be held to its contractual undertaking and why an arbitration clause should not be considered as an implied waiver of the plea of immunity. It is difficult to conceive circumstances which more clearly point to a waiver of immunity than an arbitration clause. It implies exclusivity of the tribunal contemplated by it. One cannot give business efficacy to such a clause if one assumes it to have the effect of allowing one party unilaterally to repudiate it. And if the officious bystander had asked the parties or any reasonable man whether such repudiation was intended to be permitted a very clear answer in the negative would have been forthcoming.[5]

[1] Art. 36 (2).

[2] For criticism see, in particular, Cohn, this *Year Book*, 34 (1958), p. 260. He is the only writer who has put forward an explanation of the curious doctrine that submission to jurisdiction is ineffective except if declared *in facie curiae*. It is a purely English doctrine which is based on unacceptably narrow and dogmatic reasoning.

[3] The decision quite clearly relates exclusively to the enforceability of an award by judicial proceedings. This is an entirely different question from that discussed in the text.

[4] [1924] A.C. 797.

[5] This is a wholly traditional method of approaching the question of waiver and very much less extreme than what has from time to time been done in this field. See, on the one hand, the decision of the Appellate Division of the Supreme Court of New York in *Hannes* v. *Kingdom of Roumania Monopolies Institute*, 20 N.Y.S. 2d 850 (1940), where it was considered possible that the usual provisions in a statute creating a corporation according to which it may sue and be sued constituted a waiver of the plea of immunity. And see, on the other hand, the decision of the English Court of Appeal in *Baccus S.R.L.* v. *Servicio Nacional* (1957), 1 Q.B. 438, where a similar provision was, rightly, considered immaterial to the problem of waiver (see at p. 472 *per*

In 1932 the Harvard Research suggested that a State should not be entitled to immunity if it had previously consented to the institution of proceedings by a contract upon which the proceedings are based. Its authors described this result as 'so obviously equitable that its general acceptability may be assumed'.[1] Their view was in fact supported by decisions of the Supreme Courts of Germany and of Greece.[2] Since then, the American Law Institute's *Foreign Relations Law* seems to have adopted the same rule.[3] It is, indeed, a rule that is both legally sound and intrinsically meritorious.

Nevertheless, it will always be prudent for parties to avoid all doubt by framing the arbitration clause so as to ensure its efficacy without resort to any tribunal. Thus, the clause should provide machinery for the appointment of an arbitrator or umpire if the State fails to co-operate, whatever the reason may be.[4] It should provide, moreover, for the right of the arbitrator to pronounce upon the validity and effect of the arbitration clause as well as upon his own jurisdiction. And, finally, it should make it clear that the arbitration is to be held outside the territory of the contracting State.

(ii) Enforcement of the award by execution against the State is, in the absence of consent, impossible even in most of those States which do not extend the doctrine of sovereign immunity to acts done *jure gestionis*.[5] Enforcement of the award, however, comprises not only execution in the accepted sense of the term, but also turning the award into a judgment or a title equivalent to a judgment by providing it with an *exequatur* or some similar judicial certificate. Is the latter type of enforcement sanctioned by the waiver of immunity included in the arbitration clause and the submission of arbitration proceedings? Or has it to be considered from the point of view to execution? In other words, does the judgment constitute the final point of the arbitration or the beginning of, or at least a preliminary to, execution?

Parker L.J.), but where an appearance entered and maintained for eighteen months was held not to constitute waiver in the absence of knowledge of the legal position on the part of, and authority given by, the sovereign; Singleton L.J.'s dissenting judgment is wholly convincing. It is not certain that the argument addressed to the Court on behalf of the unsuccessful plaintiffs was as broadly based as would have been desirable.

[1] *American Journal of International Law* (1932), Supplement, 453, 548. For the text of Art. 8 and comment see p. 548.

[2] *Juristische Wochenschrift* (1926), p. 804 and *Annual Digest*, 1927–8, Case No. 109, respectively.

[3] The text of s. 70 is perhaps not entirely clear, but the illustration on p. 219 leaves no doubt about the author's intention.

[4] In doing so, the pitfalls should be avoided which came to light in the *Anglo-Iranian Oil Company* case and which are discussed below, p. 20.

[5] The problem of enforcement seems to have been involved in *N.V. Cabolent* v. *N.I.O.C.*, *International Legal Materials* (1966), vol. 5, p. 477, the Dutch sequel of the *Sapphire International* case mentioned above, p. 8, n. 7, and below, p. 24, n. 1. The decision can perhaps be justified on the ground that the plaintiffs attempted to execute the award.

This was, it is submitted, the real problem with which the House of Lords was confronted in *Duff Development Co.* v. *Government of Kelantan.*[1] An award against Kelantan had been made by arbitrators. The application to the Court by the successful contractors was for an order that the award be made a judgment of the Court. The House rejected the application. The reason given by Viscount Cave[2] with whom, in effect, Lord Sumner[3] and Lord Dunedin[4] agreed, was that such an order could only be made if the Government had actually submitted to the jurisdiction of the Court and that mere agreement to submit was insufficient. This reason is, as has been pointed out,[5] unconvincing and, indeed, inadequate today. It is also lacking in precision, for the existence of an agreement to submit to the jurisdiction of the Court was assumed without discussion. Lord Finlay[6] approached the heart of the matter much more closely when he asked whether the Government had 'waived objection to execution upon their property in this country'. The answer was bound to be in the negative. Neither the arbitration clause nor the submission to arbitration implies submission to the Court. An application for enforcement serves no useful purpose except as a first step towards execution. This being precluded by the doctrine of immunity and no express or implied consent to the jurisdiction of the courts for purposes of execution having been given, the defence of immunity was rightly allowed to prevail.

(*c*) *A third person's failure to appoint an arbitrator.* If a third person[7] such as the President of a court, bank, chamber of commerce or some similar body, or the secretary of a trade association is, according to the terms of an arbitration clause, intended to appoint an arbitrator or umpire but fails to do so, a well-drawn arbitration clause or, alternatively, the *lex arbitri* may provide machinery for filling the gap. Where, however, a remedy is not available or where, in the absence of such appointment, the *lex arbitri* cannot even be determined, the arbitration clause becomes frustrated.[8]

An arbitration clause which confers a power of appointment upon a third person, does not and, indeed, cannot impose an enforceable legal duty upon a person not a party to the contract. Compliance with such an invitation is rarely more than a *nobile officium*. Failure to give effect to the invitation may, in view of the danger of frustrating the arbitration clause,

[1] (1924), A.C. 797. [2] Ibid., 809, 810. [3] Ibid., 819.
[4] Ibid., 821. [5] Above, p. 17.
[6] *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797, at 820.
[7] It is necessary to make it very clear that this section deals with the refusal of the appointor to make an appointment. Where the respondent refuses to make an appointment entirely different problems arise which will be referred to below, p. 24.
[8] That this is the consequence in law is clearly established by judicial practice in Germany (see Court of Appeal, Karlsruhe, *Neue Juristische Wochenschrift* (1958), p. 1148), but must be so in all countries in which the law makes no provision for a substitute appointor.

involve great injustice and financial damage and thus attracts heavy, albeit moral, responsibility.

In view of the very numerous contracts[1] which, without creating a legal duty, authorise a third party to make appointments, it is necessary to make it clear that such a person or body does not in any circumstances perform any judicial function in exercising the power. By making the appointment it renders no decision in the dispute between the parties, expresses no opinion on a procedural aspect or on the merits of the case nor precludes the arbitrators (or any competent court) from reviewing the validity and effect of the appointment that is made. The third party acts in a purely ministerial capacity and without prejudice to the decision of the competent tribunal. Thus, the fact that one party to the dispute alleges the invalidity of the contract or of the arbitration clause may lead to an issue to be decided by the arbitrator or by a court. But it should have no influence on the mere administrative act which the appointing body performs. This is so even in case the third person is a judge. The identity of the appointor is in law a fortuitous fact and the judicial appointor cannot have any different or larger rights, duties or functions of inquiry or decision than a chamber of commerce or any other non-judicial body. Nor does the judge act under the supervision or as a representative of his court. He acts in his private capacity. His appointment stems from a clause which, if fully spelt out, would define him, for instance, as 'the gentleman who at the relevant time will occupy the office of President of the Swiss Federal Tribunal'.

It is possible that if these considerations had been borne in mind an incident would have been avoided which is subject to serious criticism and which it is difficult to describe with academic detachment. The concession granted by Iran to the Anglo-Iranian Oil Company provided that, in the event of one party's refusing to appoint an arbitrator, the President of the Permanent Court of International Justice should be asked to appoint the sole arbitrator who would have the power, *inter alia*, to determine the place of the arbitration. Iran having failed to make an appointment, the company, on 25 May 1951, applied to the President of the International Court of Justice for the appointment of the sole arbitrator.[2] On 28 May 1951 M. Basdevant replied.[3] He referred to the proceedings which the United Kingdom had instituted against Iran in the International Court of Justice and stated that these proceedings and the Company's request

[1] A list of the treaties which provide for appointments to be made by the President of the International Court is to be found in the Court's *Yearbook*, 1963–4, pp. 255 et seq. A list of contracts including such clauses is not known. But the *Yearbook* for 1964–5 states (p. 36) that 'such requests are generally acceded to' and that 'the usual practice is to consult the President in advance and to submit the draft contract to him'.

[2] *I.C.J. Pleadings*, 1952, in the *Anglo-Iranian Oil* case, p. 387.

[3] Ibid., p. 391.

had 'certain points in common and that, consequently, I am unable to deal at present with that which you have submitted to me'. It is impossible to understand the reason for this inability. It may, however, be assumed that the common points were those which M. Guerrero was to indicate more than a year later. For after the Court had rejected the United Kingdom's application on the ground that the concession was not 'a treaty or convention' within the meaning of Iran's submission to the jurisdiction of the Court, M. Guerrero wrote to the Anglo-Iranian Oil Company on 11 October 1952 in terms which do not seem to have been published in full, but included the point that:[1]

> He did not consider himself entitled to proceed to the appointment of an arbitrator . . . He pointed out that that Agreement had conferred power to appoint upon the President or Vice-President of the Permanent Court of International Justice; no request had been addressed to the International Court of Justice by the parties to the contract to undertake functions similar to those entrusted to the President or Vice-President of the Permanent Court. Moreover, Article 37 of the Statute could not be applied since that provision related only to the settlement of cases of jurisdiction provided for in a treaty or convention between States.

It is possible that this reasoning was wrong. A question of construction was involved. The question was whether the concession had to be so construed as to refer to the President of that Court which was then known as the Permanent Court or to its successor. Article 37 of the Statute could have no bearing upon this question. It deals with cases in which 'a treaty or convention in force provides for reference of a matter to a tribunal . . . or to the Permanent Court of International Justice'. It does not affect the power of appointing an arbitrator conferred upon M. Basdevant, the President for the time being of the (International) Court, rather than upon the Court itself. It follows that M. Guerrero rendered a decision or expressed a view upon a point which was entirely outside his jurisdiction. The summary of his letter is published in the *Yearbook* of the International Court as an example of the 'extra-judicial functions' which 'the Court, or its President, are sometimes requested to perform'.[2] This is a correct characterization, and if M. Guerrero had adhered to it he would simply have refused to act[3] or would have made the appointment without prejudice to the decision which those called upon to perform judicial functions would render on the validity of his ruling and on the underlying question of construction. By failing to act extra-judicially M. Guerrero assumed the responsibility of depriving Anglo-Iranian Oil Company of its remedy. The Vice-President's conduct is aggravated by reason of the fact that,

[1] *Yearbook of the I.C.J.*, 1952–3, p. 45. [2] Ibid., p. 44.

[3] This would have been possible, but difficult, seeing that on 21 October 1933 the Court had stated that 'it sees no obstacle to the acceptance by its President and Vice-President of the functions conferred upon him by Art. 22 of the said Agreement'. *I.C.J. Pleadings*, 1952, p. 272.

if and in so far as he had the right and intention to act judicially, he had the clear duty to hear the applicant before causing it irreparable damage.

Notwithstanding its almost tragic character, M. Guerrero's refusal does not seem to have led to much scholarly discussion. Professor Johnson's contribution[1] is an exception. His reasoning, which gives the impression of an attempted vindication, cannot be accepted. He says that 'the President remains a judge, and the senior judge, of the Court, and a situation may easily arise in which the effect of an appointment of an arbitrator by the President may be to prejudge some issue which either is, or may come, before the Court'.[2] He therefore attributes to M. Basdevant 'the very proper fear' that 'a decision either to grant or to reject the Company's request for the appointment of an arbitrator would have prejudged a principal issue in the case between the two Governments'.[3] It can only be repeated that there was no 'decision' nor any possibility 'to prejudge some issue'. Professor Johnson also poses, but does not answer, the question 'whether, in appointing arbitrators, the President acts in a purely personal capacity or ultimately under the control of the Court'.[4] With the greatest respect for the eminent office which the President holds, it is suggested that, when he appoints an arbitrator, he acts in no other capacity than the Secretary of the National Association of Fishmongers who is called upon to perform the same task: he acts as a fair-minded person who may be expected to be a man of the world and to find the right man for the job about the legal existence, the nature and the extent of which others will have to reach a decision.

At this point it becomes possible and necessary to review comprehensively that part of the *Anglo-Iranian Oil Company* case in the International Court of Justice, which related to the enforcement of the arbitration clause in the Concession Agreement of 1933. It was the United Kingdom's original claim (on which, of course, no decision was pronounced) that the Court should[5]

> . . . declare that the Imperial Government of Iran are under a duty to submit the dispute between themselves and the Anglo-Iranian Oil Company Ltd. to arbitration . . . and to accept and carry out any award issued as a result of such arbitration.

The Memorial resumed the same thought, though in different words and with an eye to *restitutio in integrum*. The United Kingdom asked for a declaration that Iran

> . . . is bound, within a period fixed by the Court, to restore the Anglo-Iranian Oil Company Limited to the position as it existed prior to the said Oil Nationalization

[1] This *Year Book*, 30 (1953), pp. 153 et seq.
[2] Ibid., p. 155. [3] Ibid., p. 156. [4] Ibid., pp. 157–8.
[5] *I.C.J. Pleadings*, 1952, p. 18.

Act and to abide by the provisions of the aforesaid Convention, including the obligations of Article 22 thereof, providing for the arbitration of any differences of any nature whatever between the Imperial Government of Iran and the Anglo-Iranian Oil Company Limited . . .

On 26 May 1951, when this application was submitted, or on the date of the Memorial—10 October 1951—it was not known that the President (or the Vice-President) of the Court would frustrate the arbitration by his refusal to make the appointment. The substantial point at that time was that Iran alleged the ineffectiveness of the arbitration clause on the ground that, as a result of its nationalizing legislation, the concession agreement in general and the arbitration clause in particular had been abrogated or invalidated. However, the decision on this point was, as the United Kingdom itself seemed to recognize in its pleadings, vested in the arbitration tribunal. Had there been such a tribunal in existence, the International Court of Justice would not even have been entitled to pronounce the declaration for which the United Kingdom asked. It would have been for the arbitrators to proceed with the reference, even in the absence of Iran, and reach a decision on the issues. On this footing, therefore, the United Kingdom asked the International Court of Justice to do something that was contrary to the judicial function.[1] But the arbitration tribunal was, in fact, not constituted. Had the International Court had jurisdiction, it should, therefore, have told the United Kingdom that its national, the Anglo-Iranian Oil Company, should proceed with the arbitration. Again, there was no room for the declaration for which the United Kingdom asked. Finally, let it be assumed that the Vice-President had already communicated that refusal to make the required appointment, which he was to express a year later. In that event the arbitration would have been frustrated and the claim to a declaration made in the proceedings in the International Court would have been unjustified. Iran may well have been under a duty to appoint an arbitrator and the United Kingdom may well have been entitled to *restitutio in integrum*; but if, as a result of the Vice-President's attitude, the contemplated machinery for filling the gap broke down, this did not supply the United Kingdom with a cause of action with a view to compelling Iran to make an appointment.[2] It follows that the United Kingdom's claim to a declaration was

[1] Within the meaning of the decision in the *Northern Cameroons* case, *I.C.J. Reports*, 1963, p. 15.

[2] See in a different, though cognate, field the case of *Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania, I.C.J. Reports*, 1950, pp. 65, 221, which concerned a treaty. The Court held that reference to a Commission at the request of one State imposed the duty upon the other party 'to co-operate in constituting the Commission, in particular by appointing its representative. Otherwise the method of settlement by Commissions provided for in the treaties would completely fail in its purpose' (p. 77). At the same time, however, the refusal to make the appointment, though involving a breach of treaty, 'cannot alter the conditions contemplated in the treaties for the exercise by the Secretary-General of his power of appointment' (p. 228).

unfounded. Whether there was an arbitration tribunal in existence or not, the International Court could not intervene, because in either case intervention was pointless. What the United Kingdom should have done was to await the outcome of the application for the appointment of the arbitrator, which had been addressed to the President. If the appointment had been made, the arbitration ought to have been proceeded with. In the absence of an appointment by the President, the arbitration was frustrated by him and there was no basis for alleging any duty on the part of Iran to make an appointment itself, or for any damage caused by Iran's refusal to arbitrate. The damage arising from the frustration of the arbitration clause was caused by the Vice-President. In so far as the United Kingdom's claim was directed towards observance of the arbitration by Iran it was mistaken.

It only remains to be added by way of postscript that, for the reasons which have been outlined, it is not possible to recommend the Swiss practice relating to the status of the appointor. Thus, in the case of *Sapphire International* v. *National Iranian Oil Company*,[1] the arbitration clause provided that in the event of one party's failing to appoint its arbitrator the President of the Swiss Federal Tribunal should appoint the single arbitrator. The President made the appointment, but its validity was disputed by the respondent. On this point the arbitrator held that the arbitration clause had entrusted the appointment *à une autorité judiciaire* whose decision had *force de chose jugée*.[2] In another case between two private parties[3] the President of the Swiss Federal Tribunal refused to make the appointment on the ground that the validity of the arbitration was in issue and that, therefore, the arbitrators had to decide about it, while he was precluded from doing so. Why in either of these cases the President was called upon or had the power to make a judicial decision has remained unexplained[4] and appears to be contrary to principle and good sense.

(*d*) *Progress of the arbitration in the event of the State's absence or a party's failure to appoint its arbitrator.* In the event of a party to the State contract and, in particular, the State refusing to participate in the arbitration the remedy available to the claimant is, in principle, not open to

[1] I.L.R., vol. 35, p. 136, at p. 167. On this see, in particular, J. F. Lalive, *Annuaire suisse de droit International* (1962), p. 273, and *International and Comparative Law Quarterly* (1964), p. 987.

[2] See Lalive, loc. cit. in the preceding note, at p. 283. Against this part of the decision Suratgar, *Columbia Journal of Transnational Law*, 3 (1965), pp. 152, 176 et seq. whose reasoning is somewhat diffuse, but in essence convincing.

[3] BGE 88 I 100 (7 July 1962).

[4] The decision is particularly unsatisfactory in that no arbitration tribunal could ever decide upon the validity of the arbitration clause, unless it had previously been appointed. Yet the President made the appointment impossible.

doubt: the arbitration can proceed unilaterally in such manner as the arbitration clause or, alternatively, the *lex arbitri* may permit with a view to setting the arbitration in motion.

In practice, numerous and serious difficulties are liable to occur, particularly in case the arbitration clause fails to lay down the machinery for creating the tribunal without both parties' co-operation. Thus, the *lex arbitri* may be uncertain, because the seat of the tribunal is not determined in the arbitration clause, but is a matter for decision by the arbitrator or umpire. Or the *lex arbitri* may not provide a remedy against a party refusing to appoint its arbitrator. In such circumstances arbitration is effectively stultified.[1] In the result, the claimant party may be compelled to consider whether it should pursue any remedy open to it in the ordinary courts, including the courts of the defaulting State. If, on the other hand, notwithstanding the absence of the State, the arbitration can proceed in accordance with the *lex arbitri*, the tribunal will hear the case and eventually render an award which is binding upon the defaulting State and entitled to international recognition.[2]

Where the State's failure to co-operate stems from the purported abrogation of the arbitration clause[3] or of the contract as a whole, the legal position is, in principle, the same, but requires some additional explanations.

(i) Any such abrogation cannot possibly be material except in the event of the law of the abrogating State being applicable. If, according to the conflict rules of the *lex arbitri*, the contract or the arbitration clause is subject to a legal system other than that of the abrogating State, consideration of the latter's legislation is in any case precluded.

(ii) Even if, prima facie, the law of the abrogating State is applicable, this does not necessarily impede the progress of the arbitration, for the arbitrators may well reach the conclusion that for reasons of *ordre public* or on some similar grounds, they cannot give effect to the abrogating legislation.

(iii) It is, accordingly, not open to a court or other body to refuse, for instance, to appoint an arbitrator on the ground that there may be doubt about the continued validity of the arbitration clause or of the clause conferring powers of appointment upon the court or other body or of the agreement as a whole. For the reasons already outlined, the effect of total or partial invalidity is a question to be decided by the arbitrators when

[1] For a very clear example, see the cases between France and Lebanon referred to below, p. 27, n. 3.

[2] This happened, for instance, in the *Lena Goldfields* case, above, p. 7, n. 6, and in the case of *Sapphire International*, above, p. 24, n. 1.

[3] Jimenez de Aréchaga, *Mélanges Gidel* (1961), p. 375 seems to take the view that it is never open to a Government to abrogate the arbitration clause in a contract to which it is a party.

constituted.[1] Similarly, it would be wrong to argue that in the absence of a valid arbitration clause no tribunal can have jurisdiction. It is for the arbitrators to decide upon their jurisdiction and, for this purpose, to pronounce upon the continued validity of the arbitration clause.[2]

No discussion of these matters has taken place in England where s. 10 of the Arbitration Act 1950 confers power upon the High Court or a judge thereof to make appointments in a number of circumstances, e.g. where 'an arbitration agreement' provides for a reference to a single arbitrator and the parties are unable to select him. It should be sufficient that there appears to be 'a written agreement to submit present or future differences to arbitration'.[3] It is not the function of the court, when making the appointment, to investigate the validity of the agreement, for if it were to hold the agreement invalid, it would render arbitration impossible and thus prevent a decision by the appropriate body on the very question at issue. Similarly, if the court were to treat the agreement as valid, there would be the great danger that the arbitrators would consider themselves bound, whether in law or in fact, to accept and follow the court's ruling, and thus once again to forgo their own right and duty of decision. The court merely makes the appointment. Its decision on this point is binding and renders the arbitrator's position invulnerable, even if the arbitration agreement should be invalid. While the court necessarily acts judicially, it does not, in such cases, perform the judicial functions of deciding an issue.[4] It must, however, be added that a different view seems to prevail in Germany where s. 1029 of the Code of Civil Procedure in certain events allows the court to make appointments.[5] The point, however, has not been discussed in depth. It should certainly not be decided by asserting the judicial function which the court normally performs (this is undeniable) and which is (wrongly) said to presuppose the right to inquire into the existence of a valid arbitration agreement.

(*e*) *Refusal of arbitration as a denial of justice.* It follows from the preceding observations that there are many circumstances in which the attitude of one party to an arbitration clause and, in particular, of the contracting State results in the impossibility of setting up or operating the arbitration tribunal. Usually this is the direct responsibility of the State; as, for instance, when the State fails, and no other person or body is authorized, to appoint an arbitrator. Or the responsibility is indirect as, for instance, when an arbitrator withdraws from the proceedings, perhaps even at the

[1] See above, p. 20.

[2] In the case of *Losinger & Cie, P.C.I.J.*, 1938, Ser. C, No. 78, the arbitrator wrongly failed to do this; see below, p. 29.

[3] S. 32 of the Arbitration Act, 1950.

[4] On the characteristics of the judicial power and function see *United Engineering Workers' Union* v. *Devanayagam* (1967), 2 All E.R. 367.

[5] See Baumbach-Schwab, *Schiedsgerichtsbarkeit*, pp. 109–10.

request of the State, and there is no machinery for appointing a substitute. Can such or similar lack of co-operation on the part of the respondent State, which frustrates arbitration, be considered as a denial of justice so as to permit the State entitled to protect the interests of the contracting alien to invoke the rules of international responsibility? An affirmative answer has been given by Switzerland,[1] the United Kingdom[2] and France,[3] though, not unnaturally, the opposite view has been taken by their opponents, namely Yugoslavia, Iran and Lebanon respectively. Thus, the United Kingdom formulated its submissions as follows:[4]

> (*d*) In rejecting arbitration, the means provided by Art. 22 of the Convention for settling 'tous différends de nature quelconque entre les parties'. . . the Imperial Government of Iran have denied, or are attempting to deny, to the Company the exclusive legal remedy expressly provided for in the Convention.
>
> (*e*) In purporting unilaterally to annul or alter the terms of the Convention with the Company, and in denying, or attempting to deny, to the Company the exclusive legal remedy expressly provided for in the Convention, the Imperial Government of Iran have been or will, if they persist in the denial of this remedy, be responsible for a denial of justice against a British national.

The point has, however, never been decided. Nor has it been fully argued. It is necessary, therefore, to consider the three different cases which are liable to arise.

(i) Does the mere refusal or failure to arbitrate in accordance with an arbitration clause amount to a denial of justice?

It would be wrong to fasten upon the fact that mere non-performance or breach of a contract made between a State and an alien does not necessarily constitute a tort within the meaning of the rules of State responsibility,[5] and to conclude that the repudiation of an arbitration clause cannot, as such, be treated as a denial of justice. Whatever the position may be in regard to contractual obligations in general, the repudiation of an arbitration clause has a distinct and special character in that it involves the denial of access to the only tribunal which has jurisdiction and upon which the parties have agreed. The failure to afford access to tribunals has traditionally been treated as a peculiar and particularly grave instance of State responsibility. It is submitted, therefore, that it would be in line with the accepted tendency of international law, sound doctrine and the demands of justice to hold that a State which repudiates an arbitration

[1] Case of *Losinger & Cie, S.A.* (*Switzerland* v. *Yugoslavia*), *P.C.I.J.*, 1938, Ser. C, No. 78.

[2] *Anglo-Iranian Oil Company* case (*United Kingdom* v. *Iran*), *I.C.J. Pleadings*, 1952, p. 120.

[3] *Electricité de Beyrouth Company* case (*France* v. *Lebanon*), *ibid.*, 1954, pp. 14, 56; case concerning the *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and The Société Radio-Orient*, ibid., 1960, p. 39.

[4] Above, n. 2 on this page, at p. 12.

[5] See below, p. 30, n. 7.

clause denies justice.[1] In the past, it is true, denial of justice in the strict and narrow sense of the term implied the failure to afford access to the tribunals of the respondent State itself. But there is no reason of logic or justice why the doctrine of denial of justice should not be so interpreted as to comprise the relatively modern case of the repudiation of an arbitration clause. The respondent State which, wilfully and as a result of its own initiative, has failed to implement an arbitration clause, can hardly allege that it has afforded justice in general or the agreed justice in particular, or complain that it is aggrieved by being held responsible for its own deliberate acts. Nor should it be argued that denial of justice presupposes the failure of the State as sovereign to provide proper access to its tribunals, while the State which simply disregards an arbitration clause acts, not as a sovereign, but in the same manner as any private person could do. This would be a somewhat conceptualist reasoning. In its practical effect the failure of a contracting State to implement an arbitration clause is tantamount to barring access to the tribunal which could, should, and is agreed to, be available. Obstruction by a State has a different quality from obstruction by a private person.

(ii) There are occasions when the failure to implement an arbitration clause results from specific legislation directed against the contracting alien. This is really an *a fortiori* case. It occurred in its most classic form when the property of the Anglo-Iranian Oil Company was taken by Iran in 1951. This entailed the purported annulment of the concession (falsely called 'Convention') granted to the Company in 1933 and the repudiation of the arbitration clause included in it. To treat such incidental effects of a far-reaching scheme of spoliation as a denial of justice may be a little artificial and disproportionate, and it is by no means obvious why in the *Anglo-Iranian Oil Company* case[2] the United Kingdom decided to put so much emphasis on the Company's right to arbitration. This right is, in such circumstances, overshadowed by the rights flowing from violations of the most elementary rules of public international law. One expects such violations to provide the primary cause of action. Arbitration about them is not in private life a familiar experience.

(iii) Much more difficult questions arise where the State's failure to arbitrate results from general and in every respect unobjectionable legislation which it enacts. This is, for present purposes, assumed to have occurred in the case of *Losinger & Cie*, which led to proceedings between Switzerland and Yugoslavia before the Permanent Court of International

[1] In the same sense O'Connell, *International Law*, vol. 2, pp. 1071–2. Cf. Hyde, *International Law* (2nd ed., 1945), vol. 2, p. 879, according to whom a State is under a duty to afford access to a tribunal, and Eagleton, *Responsibility of States in International Law* (1928), pp. 167–8, who says that a State commits an international wrong if it 'does not permit judicial action against itself'.

[2] Above, p. 27, n. 2.

Justice.[1] A contract governed by Yugoslavian law was made in 1929 between a Swiss firm and the Yugoslavian Government. In August 1934 it was repudiated by the Yugoslavian Government. The Swiss firm commenced arbitration proceedings. Before the Swiss umpire whose award, according to the express terms of the contract, had to be rendered in Yugoslavia,[2] the respondent Government relied on a Yugoslavian law of July 1934 which provided:[3] 'Les procès contre l'État ne peuvent être intentés que devant les tribunaux réguliers de l'État.' The umpire committed an obvious error in that he failed to pronounce upon the Yugoslavian defence and held (wrongly) that he was without jurisdiction to do so. Accordingly he suspended the arbitration proceedings and decided to 'laisser au Parties le soin de soumettre cette question a l'autorité compétente'.[4] The Swiss firm, however, did not apply to the Yugoslavian (or Swiss) courts. Switzerland took up its national's case and started proceedings in the Permanent Court of International Justice, alleging a breach of the principles *pacta sunt servanda* and *abus de droit*, though not relying expressly and formally on denial of justice. It is possible that the Swiss case failed to show any cause for action; in particular, no denial of justice had taken place, for the (wrong) decision of the arbitrator bound the parties and compelled the Swiss firm to apply to the courts for a ruling. If one disregards this aspect of the matter, the question remains whether the Yugoslavian statute of July 1934 involved a denial of justice.

If, as appears likely, the *lex arbitri* was Yugoslavian and if, accordingly, Yugoslavian law was material at all, the statute could not be ignored. Its construction and effect may, it is true, have been the same as that of the cognate provision of French law.[5] But if it invalidated the submission, then, on the basis of the umpire's decision, there was no warrant for treating it as a denial of justice. It was, so it is assumed, a general, non-discriminatory law enacted by the *lex arbitri* and held by the umpire to have a decisive effect upon the arbitration. A government which acts in accordance with such a law cannot be said to frustrate an arbitration clause and thus to commit a denial of justice. Even if the umpire had not rendered a decision, but the Yugoslavian Government had kept aloof from the arbitration in reliance on the law of 1934, a denial of justice would not have occurred, for the failure to participate would have been sanctioned by a general law enacted by the *lex arbitri*.

It only remains to add that if, on the other hand, the *lex arbitri* had not been Yugoslavian, the statute of July 1934 could not possibly be material. The umpire should have proceeded with the arbitration and no occasion for considering a denial of justice would have arisen.

[1] *P.C.I.J.*, 1938, Ser. C, No. 78.
[2] See Art. XVI, ibid., p. 7.
[3] Ibid., p. 118.
[4] Ibid., p. 117.
[5] Above, p. 14.

(*f*) *Failure to comply with award as an international wrong.* Is the State's international responsibility engaged by reason of its failure to satisfy an award (or indeed a judgment) rendered against it?

There has been singularly little discussion of this question, but in 1939 Belgium submitted, and Greece did not deny, that the answer should be in the affirmative. This occurred in the *Société Commerciale de Belgique* case which came before the Permanent Court of International Justice.[1] The decision itself[2] is of very limited effect in that it merely established the binding character of the award rendered in an arbitration between Société Commerciale de Belgique and Greece—a result that could hardly be open to doubt. But before the picture became obscured by several changes of position in the parties' pleadings, Belgium put forward the thesis that 'le refus de l'éxécution' of the award was an international wrong on the ground that it signified 'une méconnaissance des droits acquis par une société étrangère et constitue une violation des principes de droit international'.[3] Greece did not by any means dissent from this proposition, but alleged that it was impossibility, not refusal of performance, that was in issue.[4] The point does not seem, however, to have been developed at length. Nor is it carried much further by Hyde's assertion[5] that the refusal 'to heed the adverse decision of a domestic court' involves a denial of justice.

Such a view is certainly attractive and merits support, but in the present state of the law it is not easy to discover its legal foundation. The idea that a State may be sued at all is of comparatively recent origin and, perhaps, not yet generally followed. According to the law of many countries execution cannot be levied in respect of a judgment rendered against the State; this is so, for instance, in English law,[6] and applies even where the State has agreed to submit and has submitted to the jurisdiction of the tribunal. Such a rule has the effect that the obligations of the State, whether contractual or not, suffer from a congenital infirmity of which alien contractors must be aware and which makes it difficult to speak of a generally recognized legal duty to satisfy a judgment or award. Moreover, it is likely that the mere non-performance of a State's contractual obligations does not constitute an international wrong.[7] Although an award (or judgment) may be described as a specially solemn obligation or, in

[1] *P.C.I.J.*, 1939, Ser. A/B, No. 78, p. 21. [2] For references see above, p. 3, n. 4.

[3] P. 23. No international tort is indicated by this phrase. For a different view, apparently, see Jiménez de Aréchaga, *Mélanges Gidel* (1961), pp. 380–1.

[4] *P.C.I.J.*, 1939, Ser. A/B, No. 78, p. 100.

[5] *International Law* (2nd ed., 1945), vol. 2, p. 990.

[6] S. 25 (4) of the Crown Proceedings Act, 1947.

[7] On this problem see Mann, *American Journal of International Law*, 54 (1960), p. 572; Amerasinghe, ibid., 58 (1964), p. 881; Schwebel, *Proceedings of the American Society of International Law* (1959); Jennings, this *Year Book*, 37 (1961), p. 156; and many others.

the terminology of the common law, as a 'contract of record', this, therefore, does not carry the argument much further. It is certainly true that, as the Permanent Court of International Justice held,[1] 'en signant le compromis le Gouvernement Héllénique s'était engagé de manière irrévocable à respecter et à éxécuter la sentence qui interviendrait', but this applies to all arbitrations and, indeed, all agreements and does not, by itself, permit the treatment of non-performance as an international tort.

Yet it is suggested that the rule is defendable on the ground of its inherent justice. What is decisive is the attitude in fact adopted by States towards judicial decisions adverse to them and rendered by a tribunal of competent jurisdiction. Whatever the strict legal position may be and whatever excuses a State may in law be able to put forward, in fact such decisions are, it is believed, almost invariably obeyed by all those nations which, by their devotion to the judicial process and its dignity, determine the minimum standard. If this were not so, grave injustice would arise, for after years of litigation and after much expenditure the alien would be deprived of the fruits of his efforts. In the broad sense of international law a State would be guilty of an *abus de droit* if it claimed the right thus to lead the alien contractor by the nose.

In this connection it is necessary to draw attention to Article 27 of the Investment Disputes Convention, according to which 'no Contracting State shall give diplomatic protection or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute'. This provision clearly assumes that non-compliance by a State with an award might lead to an international claim. In this limited sense it lends support to the submission made above.

(*g*) *The exhaustion of local remedies.* Until recently the relevance of this problem of international arbitration had been discussed only in a haphazard fashion, but attention has now been drawn to it in a fairly comprehensive, though not altogether happy, article by Schwebel and Wetter.[2] The principal criticism arises from their omission to distinguish between the three different questions that may occur. First, is the arbitration itself dependent upon the prior exhaustion of local remedies? Secondly, can the State's failure to co-operate in the constitution of the tribunal or the conduct of its proceedings be made the subject-matter of an international claim before the exhaustion of local remedies designed to compel the State to participate in the arbitration? Thirdly, can the failure by the

[1] *Société Générale de Belgique* case (*Belgium* v. *Greece*), *P.C.I.J.*, 1939, Ser. A/B, No. 78, p. 2.
[2] *American Journal of International Law*, 60 (1966), p. 484.

State to implement an award rendered against it give rise to an international claim in the absence of prior exhaustion of local remedies?

(i) In the first of these cases there is, or should be, no room at all for the operation of the rule. This has to be considered where a State espouses the interests of one of its nationals against another State; it makes good sense that the respondent State should not be exposed to an international claim, unless the claimant State's national has first established that redress cannot be obtained from the respondent State's municipal tribunals, namely the normal forum for the prosecution of claims in municipal law. Where, on the other hand, a State submits its dispute with a private person to the jurisdiction of a particular tribunal outside its own territory, whether it be a court or an arbitrator, it submits, as has been shown, to a municipal system of law, the *lex fori* or the *lex arbitri*, as the case may be. It is, accordingly, neither confronted by a State nor exposed to an international claim. Rather it faces a private person on the footing of municipal law. Accordingly, the whole idea that the rule of exhaustion could be germane to the normal conduct of international arbitration is misconceived. If, in disregard of an arbitration clause accepted by it, a State were to refuse arbitration on the ground of non-exhaustion of local remedies, this would simply be a fallacious point which could not be allowed to hold up the arbitration.[1]

Probably, therefore, in the present context the point would not have come to the fore had not Article 26 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States been framed in the following terms:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

This provision may be said to be superfluous in that it merely expresses the obvious, yet its first sentence has the advantage of eliminating a doubt which could have arisen. It must be regarded as an established principle that the conclusion of an arbitration agreement between two States does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the contracting States espouses the claim of its national.[2] The Convention is a treaty between States, although arbitrations taking place in pursuance of it will be between a State and the

[1] *Foreign Relations Law of the United States* (1965), s. 209, Comment (*a*); Spofford, *Recueil des cours*, 113 (1964–III), p. 168. Schwebel and Wetter, loc. cit. in the preceding note, at pp. 485–7, seem to have doubts, but they are without justification.

[2] The strongest case is probably the *Interhaned* case, *I.C.J. Reports*, 1959, p. 6, but see also *Salem* case (*Egypt* v. *United States*), *Reports of International Arbitral Awards*, vol. 2, p. 1189, with many references. The contrary view taken by the *Foreign Relations Law of the United States* (1965), s. 209, Comment (*b*) is inconsistent with prevailing practice.

national of another State. In these circumstances the rule referred to might have been said to be applicable. The second sentence of Article 26 preserves the parties' right[1] to incorporate special provisions into their contract. And such special provisions may well make good sense. Suppose that an 'economic development agreement' which includes an arbitration clause confers freedom from local taxation upon the investor, and suppose a dispute arises as to whether a certain charge is a tax. In the absence of special provisions such a dispute would have to be decided by the arbitrators, but it could be well understood if the parties allowed the arbitrators to decide only after the locally competent courts or authorities have established the legal character of the charge. Article 26 preserves, but does not create, the right so to agree.

But in the absence of such agreement or outside the scope of the Convention on International Investment Disputes a State that has submitted or agrees to submit to arbitration with an alien cannot resist arbitration on the ground that local remedies should first be exhausted to ascertain, for instance, the character of a charge in the nature of a tax. As a rule consent to arbitration excludes all other remedies. To put it differently, the right and duty of arbitrators to decide disputes covered by the submission is absolute and comprehensive.

(ii) If the contracting State fails to participate in the arbitration and if the arbitration clause or the *lex arbitri* does not provide machinery enabling the arbitration to proceed even in the absence of the State's co-operation, the State to which the contractor belongs may, as a matter of international protection, in circumstances that have been outlined,[2] claim relief for denial of justice. Is it in such a case open to the respondent State to plead that, notwithstanding the arbitration clause, the international claim cannot be pursued before the alien has exhausted the remedies available to him in the ordinary courts of the contracting State itself?

In its purest form the problem arose in the two cases of the *Beyrouth Companies*.[3] The *lex arbitri* in respect of an arbitration between the French companies and the Lebanon was undoubtedly French. In the face of the Lebanon's refusal to participate in the constitution of the arbitration tribunal the arbitration, it would appear, could not proceed under French law. Hence arbitration as contemplated by the contract was stultified. Could the French Republic's right to protect its nationals be resisted on the ground that these nationals should first have proceeded in the Lebanon in accordance with remedies available there? While in one

[1] It is not without interest to remember that the consent to which Art. 26 refers is that mentioned in Art. 25. This deals with a dispute 'which the parties to the dispute consent in writing to submit to the Centre'. It is a contractual consent. It is quite different, for instance, from the optional clause conferring jurisdiction upon the International Court of Justice.

[2] Above, p. 26.

[3] Above, p. 27, n. 3.

of the two cases Lebanon did not file a pleading, in the other case it confined itself to asserting an affirmative answer to this question.[1] The case of *Losinger & Cie, S.A.* is hardly more illuminating, for, although the defence was clearly raised by Yugoslavia, the case was not really an international one (as the *lex arbitri* was Yugoslavian) and, moreover, was bedevilled, as has been shown,[2] by the umpire's decision which was binding upon the parties and therefore minimized the effect of the rule of customary international law. The case of the *Anglo-Iranian Oil Company*, it must be repeated,[3] is not a typical case illustrating the frustration of an arbitration clause; but it involved an international tort of such gravity and intensity as to overshadow the incidental repudiation of the arbitration clause and to render Iran's policy of frustrating it a minor step in a vast scheme of spoliation. Yet it was in this case that one finds a statement, though no reasoned development, of the argument in support of the view that, where the law of the respondent State does not provide the *lex arbitri*, such State's international responsibility for the repudiation of the arbitration clause does not presuppose the exhaustion of remedies available under its law. Iran took the point that 'l'accusation de déni de justice ne pourrait donc intervenir conformément au droit international général qu'après épuisement préalable des instances internes'.[4] The United Kingdom's reply was to the effect that the concession of 1933 'provided for arbitration and that, on any view, therefore, the Company was not obliged or even permitted to have recourse to the Iranian municipal courts'.[5]

It is necessary to leave aside the much wider issues raised by a claim for illegal confiscation, and to confine the discussion to the narrow point of a denial of justice inherent in the failure to implement an arbitration clause. The local remedy which bears upon the latter point is, not a remedy to test the legality of the confiscation or to recover compensation, but solely a remedy to procure the constitution or the operation of the arbitration tribunal. Where a local remedy of this type is available, it will probably have to be exhausted. The only reason for suggesting that a principle of general application should be disregarded could be a waiver by the respondent State. Such a waiver would have to be communicated to the claimant State; it cannot be derived from any contractual arrangement made with the contracting alien. In particular, the arbitration clause as such does not imply it, nor can it be inferred from the fact that, *ex hypothesi*, the *lex arbitri* is, and is agreed to be, different from the law of the respondent State. International law includes no rule which defines the local remedies that must be exhausted as those only which are provided by the forum

[1] Case concerning the *Compagnie du Port, des Quais et des Entrepôts de Beyrouth. . . , I.C.J. Pleadings*, 1960, pp. 67–70.

[2] Above, pp. 15, 29. [3] Above, p. 28. [4] *I.C.J. Pleadings*, 1952, p. 291.

[5] Ibid., p. 365.

chosen by the contract between the respondent State and the alien. There is a strong argument to the contrary, namely that the rule contemplates the local remedies provided by the respondent State itself. The rationale of the rule points in the same direction; if an application to the ordinary courts of the respondent State can undo the wrong suffered by the alien, it is in the interests of the peaceful settlement of disputes between States to have this done before international litigation is started.[1]

It is likely that Schwebel and Wetter take a different view:[2]

> Conversely, where the arbitral process is not governed by the municipal law of the contracting State, then no municipal remedies of the contracting State need be exhausted; arbitration within the four corners of the agreement to arbitrate is the sole remedy which the alien must exhaust.

It is, however, doubtful whether the learned authors' minds were directed to the same point as that which is now under discussion, i.e. the case in which arbitration cannot proceed under the *lex arbitri* which differs from the law of the contracting State and, therefore, does not effectively provide the sole remedy. But if they do contemplate this case, their answer, which is not supported by reasoning, cannot be accepted.

If the result appears unsatisfactory this is inherent in the rule of local remedies. Its operation can be avoided only if, and in so far as, the absence of a 'genuine link' with the contracting State may serve as an exception. Suppose that under an English contract and for a sum payable in sterling in England a shipyard in England builds a merchant ship for a foreign State and undertakes to make delivery in England, and suppose that the arbitration in England which the contract contemplates cannot take place on account of the foreign State's obstruction. There is much to be said for the view[3] that the link with the foreign State, its territory, its tribunals, its law is so tenuous as to render the exhaustion of local remedies inappropriate and unjust.

(iii) There remains the question whether the State against which an award has been rendered, which fails to comply with it and therefore, in principle, attracts international responsibility, may require remedies available against it in its own municipal courts to be exhausted. Suppose an arbitration between a British corporation and Utopia has taken place in Geneva and resulted in an award under which Utopia has to pay a large

[1] In the same sense Professors Sohn and Baxter, quoted by Schwebel and Wetter, loc. cit. (above, p. 31, n. 2), at p. 499, n. 67.

[2] Ibid., p. 499; cf. Hyde, *Recueil des cours*, 105 (1962–I), p. 352. See also Olmstead, *California Law Review*, 49 (1961), p. 504, at pp. 510–11, according to whom 'the inclusion of an arbitration clause in a foreign investment agreement may indicate a waiver of the local remedies rule, but the question ultimately depends upon the intention of the parties'. This is open to much doubt. Would even an express waiver in a contract under municipal law have effect and validity so as to permit an international claim?

[3] Meron, this *Year Book*, 35 (1959), p. 83, at pp. 94 et seq.

sum of money. Utopia does not pay. The United Kingdom takes up its national's claim and is met by the answer that the British corporation should and could have applied to the Utopian courts with a view to enforcing the award.

In principle such a defence is well founded. If there is a remedy under Utopian law it must be exhausted. There is no argument in favour of a different result. In particular, there is no waiver that could possibly extend to the enforcement of the award. Nor is there any reason of legal policy or justice which could be said to relieve the claimant of the duty to exhaust local remedies. Nor has the existence of any such exemption ever been asserted.

IV

It seems convenient to conclude by summarizing the principal results which, it is submitted, the preceding discussion is likely to establish.

1. While arbitration between States is governed by public international law, arbitration between a State and an alien is, like arbitration between private persons generally, governed by a municipal system of law, namely the law of the country where the arbitration tribunal has its seat (*lex arbitri*).

2. Such arbitrations between States and aliens are neither subject to nor illustrations or sources of public international law to any, or any greater, extent than decisions of municipal tribunals which may in certain circumstances contribute to the development of general principles of law recognized by civilized nations.

3. The only type of contractual arbitration between a State and an alien that, exceptionally, is subject to public international law is an arbitration under the Convention on the Settlement of Investment Disputes.

4. Where, under its own law, a State is precluded from submitting to arbitration, the *lex arbitri* will pronounce upon the scope and effect of such disability; but the recent French practice refusing to treat it as a case of incapacity and rendering it inapplicable to international contracts should be welcomed as exemplary.

5. The enforcement of an arbitration agreement against the contracting State is not precluded by the latter's immunity, for the arbitration clause implies the waiver of immunity.

6. The doctrine of immunity precludes the enforcement of the award by execution as well as by a (preliminary) order for an *exequatur* of the award. This is different only in countries which permit execution of judgments or awards rendered in respect of commercial matters.

7. If the arbitration agreement provides for a third person to appoint an arbitrator or umpire, such third person does not act judicially and

therefore is neither entitled nor bound to enter upon any discussion relating to the validity, construction or effect of the contract or the arbitration agreement. He should make the appointment and leave it to the arbitrators to decide all questions of substance. If he refuses to make the appointment and thus frustrates arbitration, his moral responsibility is heavy.

8. In the event of the contracting State refusing to participate in the arbitration, the arbitration agreement or the *lex arbitri* may provide machinery for permitting the arbitration to proceed, but if a court is called upon to intervene it should do so without deciding any question of substance such as the validity of the arbitration agreement. In such cases the court does not perform a judicial function.

9. Where a State refuses to proceed to arbitration as contemplated by the arbitration agreement it is guilty of a denial of justice. This does not apply, however, where such refusal stems from general legislation which is not discriminatory or confiscatory or otherwise inconsistent with the minimum standard and which, according to the *lex arbitri*, invalidates the arbitration agreement.

10. A State which fails to implement an award rendered against it is guilty of an international tort.

11. In the cases contemplated by the two preceding paragraphs the rule requiring the exhaustion of local remedies applies and, if disregarded, provides a defence.[1]

[1] Nothing has been said in this article about the substantive law which may govern contracts between States and aliens and which the arbitrators may have to apply. This is an entirely distinct problem of some importance, which is dealt with in two earlier contributions to this *Year Book*, 21 (1944), p. 11, and 35 (1959), p. 34. It may in due course be necessary to revert to it at some length in order to consider the rapidly growing literature on the subject, and also a significant observation by Megaw, J. in *Orion Cia. Española de Seguros* v. *Belfort Maats.* (1962), 2 Ll. L.R.257, at 264, and by Judge Cavin in *Sapphire International* v. *National Iranian Oil Co.* (1963), I.L.R., vol. 35, pp. 136, 172–5.

THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES AND SOME QUESTIONS OF THE LAW OF TREATIES*

By P. WEIS, PH.D., DR. JUR.[1]

I. The History of the Protocol

1. *The problem of the limitation of the personal scope of the 1951 Convention relating to the Status of Refugees*

The Convention relating to the Status of Refugees of 28 July 1951,[2] adopted by a United Nations Conference on the Status of Refugees and Stateless Persons held at Geneva in that year, was in the nature of a consolidating instrument in that it replaced the previous instruments established before the Second World War, each of which dealt with the status of specific groups of refugees only; it regulated the status of refugees in greater detail; and contained a general definition of the term 'refugee' for the purposes of the Convention. The definition in Article 1 of the Convention[3] includes in its scope persons considered as refugees under the pre-war instruments and the Constitution of the International Refugee Organization but it contains also the following general definition of the term 'refugee':

> Any person, who as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

* © Dr. P. Weis, 1968.

[1] Special Adviser, Office of the United Nations High Commissioner for Refugees. The views expressed in this article are those of the author; they do not necessarily reflect the opinions of the Office of the United Nations High Commissioner for Refugees.

[2] *United Nations Treaty Series*, vol. 189, p.137, No. 2545; see the author's Note 'Legal Aspects of the Convention of 28 July 1951 Relating to the Status of Refugees', this *Year Book*, 30 (1953), pp. 478 et seq; C. A. Pompe, 'The Convention of 28 July 1951 and the International Protection of Refugees', *Rechtsgeleerd Magazyn Themis*, (1956), pp. 425 et seq.; I. Seidl-Hohenveldern, 'Die internationale Flüchtlings-Konvention von 1951 in der Praxis', in *Festschrift für Walter Schätzel*; P. Weis 'Die Genfer Fluechtlings-Konvention vom 28. Juli 1951', *Jahrbuch für Internationales Recht* (1954), pp. 53 et seq.

[3] Cf. the author's aforementioned Note in this *Year Book*, at pp. 478 et seq. On the interpretation and application of the definition, cf. A. Grahl-Madsen, 'The Status of Refugees in International Law', vol. 1: *Refugee Character* (Leyden 1966), and P. Weis, 'The Concept of Refugees in International Law', *Journal de droit international* (1960), pp. 928 et seq.

This definition, while general in nature, is limited by the words 'as a result of events occurring before 1 January 1951'. Moreover, Article 1B of the Convention requires contracting States to make a declaration at the time of signature, ratification or accession, specifying whether the words 'events occurring before 1 January 1951' shall be understood to mean (*a*) 'events occurring in Europe before 1 January 1951'; or (*b*) 'events occurring in Europe or elsewhere before 1 January 1951'. Any State which has adopted alternative (*a*) may at any time extend its obligations by adopting alternative (*b*) by means of a notification addressed to the Secretary-General of the United Nations. The definition thus allows for a further optional limitation of the scope of the Convention *ratione personae*.[1]

The diplomatic Conference which adopted the Convention was aware of the problems which might arise from these limitations in the definition of the term 'refugee'. It therefore adopted in its Final Act the following recommendation:

> The Conference,
>
> Expresses the hope that the Convention Relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.

While governments were in general liberal in their interpretation of the words 'events occurring before 1 January 1951', the limitative nature of this dateline became increasingly apparent as time went on and as new refugee situations arose, particularly in Africa, involving hundreds of thousands of persons. Most of these 'new' refugees could not, even by a liberal interpretation of the terms of the definition, be considered as covered by the Convention, i.e. as having become refugees as a result of events occurring before 1951. Moreover, there arose an increasing discrepancy between the personal scope of the Convention and the competence *ratione personae* of the Office of the United Nations High Commissioner for Refugees according to its Statute. The Statute was adopted by the General Assembly at its Fifth Session in 1950.[2] At the same time the Assembly decided to convene a Conference of Plenipotentiaries to complete the drafting of and to sign the Convention; it recommended to participating governments to take into account the text of the term 'refugee' adopted by the Assembly.[3] The Conference, however, made minor

[1] On 15 June 1968 fifty-three States were parties to the Convention, of which thirteen had limited the meaning of the term 'events occurring before 1 January 1951' to 'events occurring in Europe'.

[2] Annex to G.A. Resolution No 428 (V) of 14 December 1950.

[3] G.A. Resolution 429 (V). of 14 December 1950.

changes in the recommended text and introduced the possibility of geographic limitation. The definition of a refugee in the Statute, which is otherwise very similar to that in the Convention, contains the following additional paragraph, numbered 6B:

> Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence . . .

It is therefore a definition without a dateline and the competence of the High Commissioner extends to persons who became refugees as a result of events subsequent to 1 January 1951, and who are not covered by the terms of the Convention.

The question of the personal scope of the 1951 Convention was raised by several delegates of States represented on the Executive Committee of the High Commissioner's Programme at its Second Special Session in 1964, and at its Twelfth Session in 1965, at which the Committee noted that the High Commissioner was studying ways and means by which the personal scope of the 1951 Convention might be liberalized.[1] The High Commissioner, it may be pointed out in this connection, is called upon to provide international protection—under the auspices of the United Nations—to refugees coming within his competence. In the exercise of this function he is charged with, *inter alia*, 'promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application *and proposing amendments thereto*' (italics added).[2]

2. *Preparatory action for the establishment of a Protocol removing the dateline*

In 1965 the Carnegie Endowment for International Peace, with the support of the Swiss Government and in consultation with the High Commissioner's Office, convened a 'Colloquium on Legal Aspects of Refugee Problems with particular reference to the 1951 Convention and the Statute of the Office of the United Nations High Commissioner for Refugees'. The Colloquium was held at Bellagio, Italy, from 21 to 28 April 1965. It was composed of thirteen legal experts from various parts of the world who participated in a personal capacity: Mr. Milan Bartos (Yugoslavia, member of the International Law Commission); Mr. Mohammed Bedjaoui (Algeria, member of the International Law Commission); Mr. E. K. Dadzie (Ghana); Mr. Edvard Hambro (Norway); Mr. Louis Henkin

[1] Report on the Twelfth Session of the Executive Committee of the High Commissioner's Programme, U.N. Doc. A/AC. 96/270, p. 7, paragraph 33.

[2] Paragraph 8 (*a*) of the Statute.

(United States of America); Sir Samuel Hoare (United Kingdom); Mr. Riccardo Monaco (Italy); Mr. Philippe Monod (France); Mr. K. Krishna Rao (India); Mr. Oscar Schurch (Switzerland); Mr. Francisco Urrutia (Colombia); Mr. Endre Ustor (Hungary, member of the International Law Commission since 1967); and Mr. Z. K. Matthews (World Council of Churches).

The High Commissioner's Office submitted a background paper to this Colloquium which set out in detail the problem of the dateline. In this paper it was suggested that, in the preparation of any instrument for the extension of the dateline, the aspect of universality versus effectiveness would have to be taken into account. As regards the aforementioned Recommendation E in the Final Act of the 1951 Conference of Plenipotentiaries, doubts were expressed in the paper whether a recommendation could provide a generally satisfactory solution for the problem of post-dateline refugees. It may be difficult, on the basis of a mere recommendation, for the governments of certain States to apply the provisions of a Convention which, beyond its contractual scope, might involve a modification of municipal *jus cogens* relating to matters such as personal status. Moreover, on the international level, measures taken on the basis of a recommendation, whereby the treatment accorded to post-dateline refugees would be assimilated to that accorded to refugees covered by the Convention, might not have the requisite extra-territorial effect, e.g. travel documents issued to such refugees.

As regards the acceptance of binding legal obligations for the removal of the dateline, two methods appeared possible: revision of the Convention or the establishment of a separate instrument. Regarding revision, the 1951 Convention provides in Article 45:

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.[1]

As to the scope of the proposed new obligation it was stated that in the interest of universality, namely of securing acceptance by the largest possible number of States, it might be desirable for it either to be limited in itself, or to contain the possibility of limitations which could be established either *ratione personae* or *ratione materiae*.

The Colloquium adopted a report which it addressed to the High Commissioner.[2] As regards the question of the dateline in the Convention, the report stated that members of the Colloquium were of the opinion that it was urgent for humanitarian reasons that refugees not at present covered

[1] A similar revision clause can be found in other United Nations treaties: cf. *Handbook of Final Clauses*, U.N. Doc. ST/LEG 6, pp. 150–1.

[2] Published in U.N. Doc. A/AC. 96/INF. 40.

by the Convention should be granted similar benefits by means of an international instrument. The Colloquium was agreed that a recommendation or a resolution would not be sufficient for this purpose and that a legally binding instrument would be necessary. While it would be possible to proceed by way of the preparation and adoption of a new Convention, whether by revision of the existing Convention or otherwise, such a procedure would, in the opinion of the participants, be too lengthy and cumbersome to meet the need for urgency. The Colloquium considered that the end in view could best be met by a Protocol to the Convention.

The Colloquium agreed that it would be essential that such a Protocol should remove the existing dateline (1 January 1951) in Article 1A (2) of the Convention, thereby making the substantive provisions of the Convention applicable in new refugee situations.

The report shows that members of the Colloquium expressed different views as to whether the Protocol should allow for reservations to Article 38 of the Convention providing for the compulsory jurisdiction of the International Court of Justice and as to whether, in view of the extended obligations devolving upon States which acceded to the Protocol, it would be desirable to allow States which acceded, to suspend in exceptional circumstances the operation of those articles of the Convention which may, under its Article 42, be subject to reservations. The Colloquium considered it important to ascertain the attitude of governments on these points. It agreed on the terms of the preamble and substantive provisions of the draft Protocol, and prepared also texts of articles relating to the questions of the compulsory jurisdiction of the International Court of Justice and of the possible suspension of certain obligations under the Convention in exceptional circumstances. In its comments to the text, the Colloquium stated that adherence to the Protocol would not be limited to States which were parties to the Convention but would be open to other States, and that the Protocol would permit reservations within the limits of Article 42 of the Convention. The Colloquium considered that the option of introducing the geographical limitation to 'events occurring in Europe'[1] should not be exercised in relation to the Protocol, being inconsistent with its purpose. However, in order not to deter some States, parties to the Convention, which had made such a declaration from accepting the Protocol, the text included a provision to the effect that existing declarations limiting the application of the Convention shall, unless withdrawn, apply also under the Protocol.[2]

The High Commissioner communicated the report of the Colloquium to the Executive Committee of the High Commissioner's Programme and

[1] See above, p. 4.

[2] U.N. Doc. A/AC. 96/INF. 40, pp. 3–4.

addressed letters to governments of States which were members of the Executive Committee and governments of States which were parties to the 1951 Convention asking them to express their views as to the form and substance of the proposal made by the Colloquium. The replies received were in general positive as to the desirability of extending the personal scope of the 1951 Convention by way of a Protocol. Some of them contained expressions of views on the question of the compulsory jurisdiction of the International Court of Justice and of a derogation clause in the case of exceptional circumstances, as well as on other matters such as reservations and the number of accessions required for entry into force. After the receipt of the replies from governments, the High Commissioner submitted to the Sixteenth Session of the Executive Committee held in October 1966, a paper entitled 'Proposed Measures to Extend the Personal Scope of the Convention relating to the Status of Refugees of 28 July 1951'.[1] A summary of the replies received from governments and a draft text of the Protocol, based on the draft of the Bellagio Colloquium and amended in the light of the replies from governments, were attached. It was pointed out in the paper that such a Protocol, dealing with a most pressing need, i.e. that of removing the dateline, would not, from a long-term point of view, in any way prevent States from proceeding to a revision of the Convention. This document was submitted to the Executive Committee in accordance with paragraph 5 (*b*) of General Assembly Resolution 1166 (XII) of 26 November 1957.[2]

The Committee considered the document submitted by the High Commissioner and took note of the text of the annexed draft Protocol; it expressed the wish that Article VII of the draft Protocol concerning reservations should not permit reservations to Article II regarding co-operation of the national authorities with the United Nations; and it further asked that the High Commissioner should submit the draft Protocol, as modified in the light of the discussions in the Committee, to the General Assembly of the United Nations (through the Economic and Social Council) in order that the Secretary-General might be authorized to open the Protocol for accession by governments within the shortest possible time.[3]

[1] U.N. Doc. A/AC. 96/346.

[2] Under paragraph 5, the General Assembly requested the Economic and Social Council to establish an Executive Committee of the High Commissioner's Programme to consist of representatives of from twenty to twenty-five States members of the United Nations or of any of the specialized agencies; this number has since been increased to thirty-one by G.A. Resolutions 1958 (XVIII) and 2294 (XXII). While the functions of the Executive Committee, as its name implies, mainly relate to the Programme of the High Commissioner's Office for material assistance to refugees, paragraph 5 (*b*) extends the functions also to the international protection of refugees, entrusted to the High Commissioner by virtue of his Statute. In the exercise of this function, the role of the Committee is to advise the High Commissioner at his request.

[3] Report on the Sixteenth Session of the Executive Committee, U.N. Doc. A/AC. 96/352, paragraphs 36–8, p. 10.

The text of the draft Protocol, as modified in the light of the views expressed by the Executive Committee, was submitted by the High Commissioner to the General Assembly through the Economic and Social Council[1] in an Addendum to his Annual Report.[2] The Economic and Social Council, at its resumed Forty-first Session in November 1966, unanimously 'took note with approval of Document A/6311/Add. 1' and transmitted it to the General Assembly as an Addendum to the High Commissioner's Annual Report.[3]

3. *Action of the General Assembly*

The Third (Social, Humanitarian and Cultural) Committee of the General Assembly considered the draft Protocol at its Twenty-first Session in December 1966, in connection with the Report of the High Commissioner. In the course of the discussion,[4] most delegates expressed agreement with the extension of the personal scope of the 1951 Convention. A draft resolution[5] was tabled by Algeria, the Congo (Brazzaville), Guinea, Libya, Mali, Mauritania, Morocco, Pakistan, Sudan, Tunisia and the United Republic of Tanzania, which were joined by Zambia. The operative paragraph reads:

1. [The General Assembly] *Approves* the annexed text of article 1 of the draft Protocol relating to the Status of Refugees providing for the elimination of the dateline 1 January 1951 mentioned in Article 1B (1) of the Convention relating to the Status of Refugees done on 28 July 1951;
2. *Decides* to consider the other articles of the draft Protocol at its twenty-second session.

Some delegates were, however, of the opinion that final action on the Protocol could be taken by the Assembly at its current Session. The representative of Algeria, Mr. Allaoui, speaking on behalf of the sponsors, stated that if the Committee decided to consider the draft Protocol as a whole, the sponsors would have no objection and were prepared to revise their proposal.[6] In the course of the further debate Nigeria tabled an amendment to the draft resolution,[7] which replaced its operative paragraphs 1 and 2 with the following paragraphs:

1. . . . *Takes note* of the Protocol relating to the Status of Refugees contained in the Addendum to the Report of the United Nations High Commissioner for Refugees (A/6311/Rev. 1/Add. 1);

[1] According to his Statute (paragraph 11) the High Commissioner shall report annually to the General Assembly through the Economic and Social Council; his report shall be considered as a separate item on the agenda of the General Assembly.

[2] U.N. Doc. A/6311/Add. 1

[3] Economic and Social Council Resolution 1186 (XLI) of 18 November 1966.

[4] Third Committee, 1447–1450th meeting, *G.A.O.R.*, Doc. A/C. 3/SR. 1447–50.

[5] U.N. Doc. A/C. 3/L. 1415.

[6] Third Committee, 1449th meeting, *G.A.O.R.*, Doc. A/C. 3/SR. 1449, p. 11.

[7] U.N. Doc. A/C. 3/L. 1418.

2. . . . *Requests* the Secretary-General to transmit the text of the Protocol to the States mentioned in Article V of the Protocol [i.e. States Parties to the Convention and any other State member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations] with a view to enabling them to accede to the Protocol.

In announcing his intention of submitting this amendment, the representative of Nigeria, Mr. Mohammed, stated that the draft resolution did not, in his view, go far enough to solve the problem. His delegation would submit an amendment proposing that the General Assembly, instead of approving the text of Article 1 and referring the study of the remaining articles to the Twenty-second Session, should take note of the Protocol and request the Secretary-General to communicate its text to the States concerned. In his view this was a perfectly normal procedure and would avoid unnecessary repetition. Moreover, countries would be free to enter reservations and to sign, or not to sign, the Protocol. Nevertheless in order to remove the apprehensions of any delegation that might consider such a procedure unjustified, his delegation would like to have the opinion of the Legal Counsel on the matter. It also wished to know whether the fact of noting the Protocol was equivalent to its acceptance and to the accession to the Convention.[1]

The Legal Counsel, Mr. Stavropoulos, replying to the question put by the Nigerian representative, said that the General Assembly—pursuant to the resolution if adopted—could transmit the Protocol to member States. They would, however, not be bound by such a procedure and would be free to ratify or not to ratify the Protocol.[2]

In the ensuing debate the representative of the Soviet Union, Mr. Nasinovsky, pointed out that the Convention of 28 July 1951 relating to the Status of Refugees had not been adopted by the United Nations but by a Conference of Plenipotentiaries at Geneva in which only twenty-six States, including only twenty-one members of the United Nations, had taken part. The Soviet Union, which had not participated in the Conference, had studied the Convention but had not found it acceptable. Since the Convention could be amended only by the Conference which had adopted it and in accordance with the procedure laid down in Article 45, the General Assembly should confine itself to making recommendations. The alternative solution would be to draw up a new instrument with the participation of the 120 States members of the United Nations. His delegation had not even had an opportunity to give the Protocol careful study. From a legal standpoint, only those States which were already parties to the

[1] Third Committee, 1449th meeting, *G.A.O.R.*, Doc. A/C. 3/SR. 1449, pp. 15–16.
[2] Ibid., p. 19.

Convention itself could be parties to the Protocol. In those circumstances, since his delegation had not been consulted with regard to the draft Protocol, it could not support the draft resolution.[1]

The Nigerian representative stated in reply that every State was free to withhold its agreement. The Soviet delegation had stated that the Soviet Union had not been consulted. However, the text in question had been approved by the Economic and Social Council in November 1966; as a member of the Council, the Soviet Union must have seen the text and voted for it, since it had been unanimously adopted.[2]

On a roll-call vote, paragraph 1 of the amendment was adopted by 86 votes to none with 15 abstentions. The words 'with a view to enabling them to accede to the Protocol' in paragraph 2 of the amendment were adopted on a separate vote by 79 votes to 2 with 20 abstentions. Paragraph 2 of the amendment was adopted by 82 votes to none with 19 abstentions and the resolution as a whole as amended was adopted by 83 votes to none with 15 abstentions.[3]

In the explanation of their votes, the representative of Jamaica said that her delegation had requested a separate vote on the words 'with a view to enabling them to accede to the Protocol' in paragraph 2 of document A/C. 3/L. 1418, and had voted against them not because it failed to realize the urgency of adopting the Protocol, but because it felt that the Protocol, as an important United Nations treaty, should have been discussed and adopted in its entirety before States were asked to accede to it; the representatives of the United Arab Republic and Afghanistan said they had abstained because they considered that from a legal standpoint the General Assembly should adopt the text of the Protocol before opening it for accession; the representative of the Philippines said that while he had voted in favour of the amendment, he would in future insist that the articles of important international instruments should be considered in detail and that the present case should not be considered as a precedent.[4]

Following the report of the Third Committee, the General Assembly adopted the proposed resolution on 16 December 1966 by 91 votes to none with 15 abstentions.[5]

The text of the Protocol[6] was, in accordance with its Article XI, authenticated by the signature of a copy by the President of the General Assembly and the Secretary-General of the United Nations, which took place on 31 January 1967. Certified true copies were transmitted to governments by

[1] Ibid., pp. 26–7.
[2] Ibid., p. 29.
[3] Third Committee, 1450th meeting *G.A.O.R.*, Doc. A/C. 3/SR. 1450, pp. 8–10.
[4] Ibid., pp. 10–11.
[5] G.A. Resolution 2198 (XXI); *G.A.O.R.*, 1495th plenary meeting, Doc. A/PV. 1495, pp. 38–40.
[6] Attached as an Annex to this article, below, pp. 67 et seq.

the Secretary-General on 10 March 1967, with a view to enabling them to accede to the Protocol. It entered into force on 4 October 1967, on the deposit of the sixth instrument of accession, that of Sweden. Previously the Holy See, the Central African Republic, Cameroon, Gambia and Senegal had acceded to it.[1]

II. Questions of the Law of Treaties Arising in Connection with the Protocol

1. *Introductory remarks*

The Protocol, in view of its character, history and the comments made by government representatives in the Third Committee, gives rise to various questions in the field of treaty law. It is proposed to examine in particular the nature of this instrument, the method of its establishment in the light of the practice of establishing multilateral treaties under the auspices of the United Nations, and the relationship between the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees.

It is suggested that an examination of any question of treaty law should be based on the work on the law of treaties of the International Law Commission of the United Nations. The Commission had the law of treaties on its agenda since 1949 and has dealt with it extensively, particularly in the years 1962 to 1966, on the basis of the reports of the Special Rapporteurs, who were all of British nationality: Professor J. L. Brierly who prepared three reports, Sir Hersch Lauterpacht who prepared two reports, Sir Gerald Fitzmaurice who prepared four reports and Sir Humphrey Waldock who prepared six reports. This monumental work—to which it is impossible to do justice in this article—in conjunction with the discussions of the reports of the Commission by the Sixth (Legal) Committee of the General Assembly and the comments of governments, certainly constitutes a highly authoritative source on the law of treaties. The work reached its culminating point in 1966, when the Commission submitted the draft articles on the Law of Treaties to the General Assembly. In Resolution 2166 (XXI) of 5 December 1966 the General Assembly decided to convene an International Conference of Plenipotentiaries to consider the law of treaties and to embody the results of its work in an international Convention and such other instruments as the Conference may deem appro-

[1] Up to 15 June 1968 eleven more States (Algeria, Argentine, Denmark, Guinea, Ireland, Israel, Liechtenstein, Nigeria, Norway, Switzerland, Yugoslavia) had acceded.

priate. The Conference is to be held in Vienna in two Sessions: the first early in 1968, the second early in 1969.

In examining the United Nations procedure for establishing and amending multilateral treaties, with which the Commission dealt only peripherally, it is necessary to consider the practice of United Nations' bodies, as it has developed over the years, official documents and the views of writers.

As to the names 'Convention relating to the Status of Refugees' and 'Protocol relating to the Status of Refugees', the term 'convention', as stated by Lord McNair, usually denotes multilateral law-making treaties, while the term 'protocol' usually denotes a treaty amending, or supplementary to, another treaty.[1] In an article dealing specifically with 'The Names and Scope of Treaties',[2] it is stated that 'convention' has become the standard name for instruments produced by multilateral bodies which study specific facets of a subject.[3] The protocol as a form of treaty is an addition or supplement to a primary instrument or to a prior transaction. The most common use of the term is as 'a subsidiary to a primary instrument for adding to, clarifying, interpreting, or modifying its provisions. Protocols that stand alone customarily include evidence of the treaty to which they are related.'[4]

The 1951 Convention relating to the Status of Refugees is mentioned by Dr. Rosalyn Higgins as an example of the fact that the descriptive name 'Convention' is now commonly used to designate the outcome of diplomatic conferences convened under the auspices of the United Nations;[5] it may be added, however, that the use of the term is not limited to multilateral treaties established in this way.

The term 'treaty' is defined as follows for the purpose of the draft articles on the Law of Treaties:

> 'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. (Article 2 'use of terms'.)

In its commentary to the article the Commission states that the term 'treaty' is used throughout the draft articles as a generic term covering all forms of international agreements in writing concluded between States[6]

[1] *The Law of Treaties* (2nd ed., 1961), pp. 22–3.
[2] Denys P. Myers, *American Journal of International Law*, 51 (1957), pp. 574 et seq.
[3] Ibid., p. 578.
[4] Ibid., p. 587.
[5] R. Higgins, *The Development of International Law through the Organs of the United Nations* (1963), p. 257.
[6] Report of the International Law Commission on the second part of its 17th and on its 18th Session (1966), *G.A.O.R.*, 21st Session, Supplement No. 9, p. 21, Doc. A/6309/Rev. 1.

and that 'there is no exclusive or systematic use of nomenclature for particular types of transaction'.[1]

At an earlier stage, the draft articles prepared by the Commission contained a definition of 'general multilateral treaties': 'General multilateral treaty means a treaty which concerns general norms of international law or deals with matters of general interest to States as a whole.'[2] Having regard to the comments of governments, however, this definition was later dropped from the text, as was a provision concerning participation in such treaties.[3]

The 1967 Protocol relating to the Status of Refugees constitutes a treaty in the sense in which this term is used in international law and in the draft articles of the International Law Commission. Both the 1951 Convention and the 1967 Protocol constitute general multilateral treaties in the accepted sense of this term, i.e. they are law-making treaties open to participation on a wide basis. The 1967 Protocol is of a dual nature: it is supplementary to the 1951 Convention for States parties to the Convention, and it constitutes an independent instrument for States acceding to the Protocol, which are not parties to the Convention.

2. *The Protocol and the practice of the United Nations in the establishment of multilateral treaties*

(*a*) *Practice of the General Assembly in the establishment of multilateral treaties.* The Charter of the United Nations deals only in one place, i.e. in Article 62 relating to the functions and powers of the Economic and Social Council, with the preparation of draft conventions (paragraph 3). A proposal to incorporate in the Charter a provision regarding the procedure for the adoption of conventions by the General Assembly was rejected at the San Francisco Conference.[4] The Economic and Social Council is competent to draft conventions for submission to the General Assembly with respect to matters falling within the Council's competence[5] and may, in accordance with the rules prescribed by the United Nations,[6] call international conferences on matters falling within its competence,[7] including the preparation of international conventions relating to such matters. It is the General Assembly, however, which has consistently played a dominant role in the establishment of multilateral treaties within the United Nations. The General Assembly has, indeed, also assumed competence in the case of multilateral conventions dealing with matters falling within the competence of the Economic and Social Council, such as

[1] *G.A.O.R.*, 21st Session, Supplement No. 9, p. 22.

[2] *Yearbook of the International Law Commission* (1965–II), p. 161.

[3] Cf. in particular the Fourth Report of Sir Humphrey Waldock, ibid., pp. 13–14, and the Report of the Commission (1966), pp. 23 and 32–3.

[4] *U.N.C.I.O.*, vol. 9, pp. 79–81.

[5] Art. 62, para. 3, of the Charter.

[6] G.A. Resolutions 17 (I), 366 (IV) and 479 (V).

[7] Art. 62, para, 4, of the Charter.

the Convention relating to the Status of Refugees of 28 July 1951 and the Convention on the Declaration of Death of Missing Persons.[1] In both cases, the conventions were established by Conferences of Plenipotentiaries convened by the General Assembly.[2]

In dealing with multilateral treaties the United Nations have adopted different techniques. We may exclude here the special procedure adopted by the General Assembly when it dealt with the amendment of certain non-political conventions adopted under the auspices of the League of Nations in order to transfer the custodian functions from the League to the United Nations, to open closed treaties to participation by additional States and to extend the material scope of these treaties.[3]

Basically the method of *inter se* agreements was applied in the case of these treaties, with the exception, based upon General Assembly Resolution 1903 (XVIII) of 18 November 1963, of the opening of certain of them to States not eligible to become parties under the text of the treaty; which may have constituted 'one more, if tentative, step towards a process of law-making—or at least law-adapting on a universal scale—by means of Assembly resolutions'.[4]

For the rest, the General Assembly has considered international conventions on the basis of drafts prepared by the International Law Commission, by functional committees, or on submission by the Economic and Social Council. In the latter case the initiative for the preparation was taken either by the Council itself or on the recommendation of its functional commissions; or else it was taken by *ad hoc* committees of the Council, by conferences convened by the Council, by specialized agencies or by non-governmental organizations with consultative status in relation to the Council. In some cases preliminary drafts were prepared by the Secretary-General; in other cases the functional commissions of the Council themselves prepared drafts. In some instances the Council set up *ad hoc* committees to prepare drafts or to prepare texts on the basis of earlier drafts, and sometimes drafts were submitted to the Council by international conferences or by subsidiary bodies. Frequently a combination of methods of preparing draft conventions has been employed.[5]

Two methods have been used by the General Assembly with regard to such drafts: establishment of the text of the treaty by the General Assembly itself through one of its main committees, or the calling of a diplomatic

[1] *United Nations Treaty Series*, vol. 119, p. 99, No. 1610.

[2] *Repertory of U.N. Practice*, commentary on Art. 62, para. 4, Doc. Legal Affairs/1955, V. 2, vol. 3, p. 295, n. 3.

[3] Cf. the interesting note by M. J. L. Hardy 'The United Nations and General Multilateral Treaties concluded under the Auspices of the League of Nations', this *Year Book*, 39 (1964), pp. 425 et seq.

[4] Ibid., p. 440.

[5] *Repertory of U.N. Practice*, commentary on Art. 62, para. 3, 1955, V. 2, vol. 3, paras. 8/9, pp. 277–9.

conference for the purpose. Which method was used depended largely on the nature of the instrument, the time element and technical considerations. Two frequently cited examples of multilateral treaties established by the Assembly are the Genocide Convention and the Convention on the Political Rights of Women.

In 1949 the General Assembly adopted, on the Report of a Special Committee on Methods and Procedures of the General Assembly, a Resolution[1] approving the recommendations and suggestions of the Committee. The Special Committee, while recognizing the importance of the sponsorship of conventions by the General Assembly, expressed itself in favour of the establishment either of special *ad hoc* committees to study draft conventions between Sessions or of convening conferences of plenipotentiaries to study, negotiate, draft and possibly sign conventions. The Assembly has followed the latter course mainly as regards conventions prepared by the International Law Commission, in the field of codification and progressive development of international law. Thus, the Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular Relations were adopted by conferences of plenipotentiaries. However, following the adoption of the already mentioned Resolution of 18 November 1963, the General Assembly has also itself considered and adopted the texts of international conventions, such as the Conventions on the Nationality of Married Women, on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, on the Elimination of all Forms of Racial Discrimination and on the International Right of Correction. The International Covenant on Social, Cultural and Economic Rights, the International Covenant on Civil and Political Rights and the Optional Protocol thereto are outstanding examples of conventions considered and established by the General Assembly. Prepared by the Commission on Human Rights, they occupied the General Assembly for thirteen years until their texts were adopted at its Twenty-first Session in 1966.[2]

The wording of General Assembly resolutions by which final action was taken on the text of a treaty has varied. The term 'adopts' or 'approves the convention' has usually been employed, but other wording has also been used. In the case of the Convention on the International Right of Correction, the General Assembly merely decided 'that the said Convention shall be opened for signature at the close of the present session of the General Assembly';[3] in the case of the Convention on the Political Rights of Women,

[1] G.A. Resolution 362 (IV) of 28 December 1949.

[2] G.A. Resolution 2200 (XXI) of 16 December 1966. Cf. on this subject 'Resolutions of the General Assembly concerning the Law of Treaties' (Memorandum prepared by the Secretariat), *Yearbook of the International Law Commission* (1963–II), p. 1.

[3] G.A. Resolution 630 (VII) of 16 December 1952.

the Assembly decided 'to open the attached Convention for signature and ratification at the end of the present session';[1] a very similar wording was used in the case of the Convention on the Nationality of Married Women.[2] In the case of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies, which had been prepared largely, but not exclusively, by the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space and for which the Secretary-General is not the depositary, the Assembly 'commended' the treaty and requested the depositary governments to open it for signature and ratification at the earliest possible date.[3] But in all cases the depositary was authorized to transmit the text to governments for acceptance in the manner provided for in the treaty and the text became *ne varietur* by the adoption of the resolution or authentication of the text by the procedure specified in the text of the treaty.

As to the voting procedure in the Assembly, this is in all cases governed by Article 18 of the Charter. Unless the treaty relates to a subject which is an important question within the meaning of paragraph 2 of Article 18 requiring a two-thirds majority vote or is, under paragraph 3 of that Article, determined to be a question requiring a two-thirds majority, the decision may be taken by a majority of the members present and voting. It is, however, known that the question whether a particular subject, including the establishment of a multilateral treaty, constitutes an important question requiring a majority of two-thirds, is not usually determined by the Assembly in advance, but only when the issue is raised.[4] In practice, the texts of multilateral treaties have been adopted by the General Assembly by large majorities exceeding two-thirds and the Resolution relating to the 1967 Protocol was adopted without a dissenting vote.[5]

(*b*) *Consideration of the question by the International Law Commission.* Article 8 of the draft articles on the Law of Treaties which deals with the adoption of the text of a treaty reads:

1. The adoption of the text of a treaty takes place by the unanimous consent of the States participating in its drawing up except as provided in paragraph 2.
2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to apply a different rule.

[1] G.A. Resolution 640 (VII) of 20 December 1952.
[2] G.A. Resolution 1040 (XI) of 29 January 1957.
[3] G.A. Resolution 2222 (XXI) of 19 December 1966.
[4] Cf. *Repertory of U.N. Practice*, commentary on Art. 18, 1955, V. 2, vol. 1, p. 567.
[5] In the case of the Convention on the Political Rights of Women, the President of the Assembly ruled that the draft convention constituted a question of importance requiring a two-thirds majority. Certain provisions of the draft convention were defeated in the plenary meeting because they did not obtain a two-thirds majority. (*G A.O.R.* 409th meeting, Doc. A/PV. 409, pp. 449–51).

Article 4, entitled 'Treaties which are constituent instruments of international organizations or are adopted within international organizations' provides:

> The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rules of the organization.

Article 8, paragraph 1, embodies the classical principle of unanimity as the applicable rule for the adoption of the text of a treaty, except in the case of a text adopted by an international conference.[1] However, Article 4 of the draft articles clearly excludes the application of the unanimity rule in the case of the adoption of the texts of treaties within the United Nations.

Paragraph 2 of Article 8, which is in the nature of a residual rule, has given rise to elaborate discussions within the Commission since it involves the question of the evolution from the unanimity to the majority concept in the establishment of multilateral treaties. There was, however, agreement among members of the Commission that whatever voting rules may apply to the adoption of a text, they do not involve any obligation to consent to be bound by the treaty in the absence of specific obligations such as those undertaken by members of certain specialized agencies by virtue of their constituent instruments (International Labour Organization, World Health Organization, United Nations Educational, Scientific and Cultural Organization and the Inter-Governmental Maritime Consultative Organization). As stated by Sir Humphrey Waldock in his first Report, participation in the adoption of the text of a treaty does not place a State under any obligation to proceed afterwards to sign, ratify, accede to, or accept the said treaty.[2] In his comments on the draft articles, the Secretary-General of the United Nations stated that:

> Paragraph 2 of draft article 8 is not in accordance with the practice of United Nations conferences, under which the adoption and amendment of the rules of procedure, including the rules relating to voting, normally takes place by a simple majority of representatives present and voting.[3]

Article 4 was originally intended to be limited to specific parts of the draft articles, but was embodied in the final text prepared by the International Law Commission as a reservation of a general nature. In the comment on the draft article prepared by the Commission at its fifteenth session[4] it is stated that 'the article covers treaties such as the International Labour Organization conventions which are drawn up and adopted by an organ of the organization concerned but not treaties drawn up under the

[1] Report of the Commission (1966), Commentary on Art. 8, para. 3, p. 27.

[2] *Yearbook of the International Law Commission* (1962–II), comment on draft Art. 5, para. 2, p. 39. See also the statement of Mr. Tunkin at the 488th meeting of the Commission, ibid. (1959–I), p. 25.

[3] *G.A.O.R.*, Doc. A/6827/Add. 1, p. 14.

[4] Then Art. 48.

auspices of the organization in a diplomatic conference convened by the organization. Admittedly a few treaties like the aforementioned Genocide Convention and the Convention on the Political Rights of Women were drawn up within an organization but the application was not particularly affected by the law of the organization.'[1]

There was some discussion in connection with the proposed article as to the adoption of treaties within or under the auspices of an international organization. A qualification suggesting that the provisions should apply to treaties whose execution was supervised by an international organization was not retained by the Drafting Committee.[2]

Some exception has been taken by States—in their comments made in 1963 and 1964 on parts I, II and III of the draft articles—to the vagueness of the term 'relevant rules'. It is clear that the term applies to constituent instruments of an international organization, such as the Constitution of the International Labour Organization which, in Article 19, contains detailed provisions on the procedure for the adoption of conventions (or recommendations), the establishment of authentic texts and the obligations of members of the organization deriving from the adoption of a convention by the International Labour Conference.

In his comments on the final text of the draft articles as submitted to the Assembly by the International Law Commission, the Secretary-General of the United Nations suggested with regard to Article 4 that the words 'or are adopted within an international organization' should be replaced by the words 'concluded under the auspices of or deposited with an international organization'. The purpose of the suggested change of wording was not to add to the rule-making competence of international organizations, but merely to avoid prejudicing the competence which some of them—notably the United Nations—possess at present under their constitutional systems, and the competence which States may consider it desirable to confer on international organizations in the future.[3]

The Food and Agriculture Organization of the United Nations in their comments presumed that the 'relevant rules of the organization' referred to in Article 4 comprise both existing rules and rules that may be introduced in the future.[4]

The United States of America, on the other hand, in their comments criticized Article 4 *inter alia* on the ground that

> It could be construed as permitting any international organization, no matter how restricted in membership or limited in purpose, to exclude the application of the

[1] *Yearbook of the International Law Commission* (1963–II), p. 213.

[2] Statement by the Special Rapporteur, Sir Humphrey Waldock, 718th meeting of the Commission, para. 90, ibid. (1963–I), p. 367.

[3] *G.A.O.R.*, Doc. A/6827/Add. 1, pp. 10–14.

[4] Ibid., p. 21.

convention to any or all treaties adopted within the organization. The number of multilateral treaties which were adopted within international organizations was continually increasing. To confer upon these organizations the power to abrogate what should be the generally accepted rules of international law respecting treaties was a radical step which could be justified only on the basis of a very strong case of necessity.[1]

This is obviously a question which will have to be resolved by the diplomatic conference which is to consider the draft articles prepared by the International Law Commission. Meanwhile, it would be rash to make sweeping statements as to the effect of the draft articles on treaties established within, or under the auspices of, the United Nations. As has been mentioned earlier, the Charter contains no pertinent rules on this matter with the exception of Article 62, paragraphs 3 and 4, regarding the functions and powers of the Economic and Social Council.

(*c*) *Procedure for the establishment of the Protocol.* The procedure followed for the preparation of the text of the 1967 Protocol relating to the Status of Refugees and for its submission to the Assembly was based on the High Commissioner's Statute. According to it, the High Commissioner shall provide for the protection of refugees falling under the competence of his Office *inter alia* by 'promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto';[2] he shall report annually to the General Assembly through the Economic and Social Council; and his report shall be considered as a separate item on the agenda of the General Assembly.[3] The draft instrument was submitted to the Assembly, through the Economic and Social Council at its Seventeenth Session; it took the form of an Addendum to the High Commissioner's Report incorporating the proceedings in the Executive Committee on the High Commissioner's Programme.

The question arises whether the different wording of General Assembly Resolution 2198 (XXI), i.e. 'takes note of the Protocol relating to the Status of Refugees', has any legal implications. In considering this question the time element is of significance. When the General Assembly considered the Protocol as an Addendum to the High Commissioner's Report, it had just completed its work on the Human Rights Covenants which, together with their final clauses, had been examined in detail by the General Assembly. Lack of time may have prevented the General Assembly from considering the draft Protocol in a similar manner. There was, however, wide agreement on its substance, namely the extension of the personal scope of the 1951 Convention. By using the expression 'takes note of the

[1] *G.A.O.R.*, Doc. A/6827/Add. 2, p. 3.
[2] See above, p. 41.
[3] See above, p. 45, n. 2.

Protocol', the Assembly may have wished to indicate that it had not considered the wording of the instrument in like detail. However, by requesting the Secretary-General to transmit the text to States with a view to enabling them to accede, the Protocol was opened to accession, and there is thus no legal difference between this and other resolutions of the Assembly by which the texts of treaties were adopted.

The Protocol can thus be considered as an instrument covered by the saving clause of Article 4 of the draft articles. Moreover, it is submitted that apart from the procedure for its adoption—which is covered by the saving clause of Article 4—the draft articles apply to the Protocol, being unaffected by the existing rules of the United Nations Organization. However, the fact of being established within the framework of the United Nations has legal consequences to the extent to which the United Nations are 'a party in interest'.[1] It is thus incumbent on any organ or body of the United Nations to fulfil such functions as may be assigned to it under the treaty. Accordingly, the Secretary-General is required, beyond the obligation of registration of the treaty under Article 102 of the Charter, to carry out the depositary functions specified in Articles V, VII, IX, X and XI of the Protocol.[2]

3. *The relationship between the 1951 Convention and the 1967 Protocol*

One of the objections raised to the adoption of the draft Protocol by the General Assembly was that the 1951 Convention had been adopted by a Conference of Plenipotentiaries and could therefore only be amended in the same manner. This raises the question of the applicability to the law of treaties of the theory of the *acte contraire* of the municipal law of contracts. Quite apart from the caution which has to be used in drawing analogies between municipal private law and international law, the theory of the contrary act has not been followed by States in their treaty practice.[3]

As indicated above, the personal scope of the 1951 Convention was extended by the establishment of the 1967 Protocol and no recourse was had to the revision procedure provided for in the Convention.[4]

[1] Cf. Clive Parry 'Some Recent Developments in the Making of Multipartite Treaties', *Transactions of the Grotius Society*, 36 (1950), pp. 149 et seq., who states that adoption of a treaty by the General Assembly has a double function: it establishes not only an authentic text but also the consent of the organization to be bound by the treaty (p. 186).

[2] As to other legal consequences of the establishment of treaties within the United Nations, see in particular Shabtai Rosenne 'United Nations Treaty Practice', *Recueil des cours* (1954–II), pp. 281 et seq., at pp. 332–9. Under the Protocol, the supervisory function of the Office of the United Nations High Commissioner for Refugees is not a result of the adoption of the instrument within the United Nations but derives from the Statute of the Office (see above). By virtue of its text (Article II) co-operation with the Office in the exercise of this task becomes an obligation for States which are parties to the instrument.

[3] Cf. the statement by Mr. Yasseen at the 753rd meeting of the International Law Commission in connection with the proposed article on the amendment of treaties, *Yearbook of the International Law Commission* (1964–I), para. 23, p. 193.

[4] See above, p. 42.

When the International Law Commission was considering the problem of the amendment and modification of treaties a discussion took place on the meaning of the term 'revision'. Some members considered the term to have a political connotation; others felt that the term applied mainly to the revision of a treaty as a whole.[1] In the articles finally adopted the term 'revision' is not employed, but a distinction is drawn between the amendment and the modification of treaties. The term 'amendment' is used to denote a formal amendment of a treaty intended to alter its provisions with respect to all the parties. The more general term 'modification' is used in connection with an *inter se* agreement concluded between certain of the parties only and intended to vary provisions of the treaty as between themselves alone, and also in connection with a variation of the provisions of a treaty resulting from the practice of the parties in applying it.[2] Articles 35 to 38 which relate to the amendment and modification of treaties read as follows:

Article 35

General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such agreement except in so far as the treaty may otherwise provide.

Article 36

Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to every party, each one of which shall have the right to take part in:

(*a*) The decision as to the action to be taken in regard to such proposal;

(*b*) The negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; and article 26, paragraph 4 (*b*) applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(*a*) Be considered as a party to the treaty as amended; and

(*b*) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

[1] Cf. discussion at the 744th meeting, *Yearbook of the International Law Commission* (1964–I), pp. 133–9.

[2] See Report of the International Law Commission (1966), commentary on Arts. 35 to 37, para. 3, p. 62; cf. also the discussion in the Commission, particularly at its 752nd meeting, *Yearbook of the International Law Commission* (1964–I), pp. 189–90.

Article 37

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(*a*) The possibility of such a modification is provided for by the treaty; or

(*b*) The modification in question:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole; and

(iii) is not prohibited by the treaty.

2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

Article 38

Modification of treaties by subsequent practice

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

During the discussion on these provisions the Special Rapporteur, Sir Humphrey Waldock, stated: 'Even a short protocol additional to an earlier treaty might have the effect of transforming it into a completely new treaty for the States which are parties to the protocol. International treaty practice showed a definite tendency to maintain old treaties in being as far as possible so as not to lose the benefit of the ratifications slowly accumulated over the years.'[1] He also referred to the 'familiar phenomenon of political inertia or a change of mind on the part of a State that had contemplated ratifying the later treaty but had failed to do so for one reason or another' owing to which 'an exact identity of parties was rare'.[2]

These observations are particularly pertinent to the 1967 Protocol. The procedure for revision of the 1951 Convention, as provided for in its terms,[3] was not resorted to in view of the urgency of extending its personal scope to new groups of refugees and of the fact that the amended treaty would have required fresh consent by the States parties to the Convention. Instead, a new instrument, the 1967 Protocol relating to the Status of Refugees, was established which does not amend the 1951 Convention and modifies it only in the sense that States acceding to the Protocol accept the material obligations of the Convention in respect of a wider group of persons. As between the States parties to the Convention, it constitutes an *inter se* agreement by which they undertake obligations identical *ratione materiae*

[1] 747th meeting of the Commission, para. 23, ibid., p. 154.

[2] 858th meeting, para. 9, ibid. (1966–I), Part 2, p. 103.

[3] Art. 45, see above, p. 42.

with those provided for in the Convention for additional groups of refugees not covered by the Convention on account of the dateline of 1 January 1951. As regards States not parties to the Convention, it constitutes a separate treaty under which they assume the material obligations laid down in the Convention in respect of refugees defined in Article 1 of the Protocol, namely those covered by Article 1 of the Convention and those not covered by reason of the dateline. As the 1951 Convention remains intact the considerable number of ratifications and accessions to that instrument are maintained. Regarding the procedure for its adoption all parties to the Convention were, as has been said, notified of the intention of establishing a Protocol and the provisions of Article 37 of the draft articles have been complied with.

With the entry into force of the Protocol there exist, in fact, two treaties dealing with the same subject-matter and the question that arises becomes one of inter-temporal law, of successive treaty obligations. Part III of the draft articles on the Law of Treaties concerning Observance, Application and Interpretation of Treaties, contains the following provision:

Article 26

Application of successive treaties relating to the same subject matter

1. Subject to article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as inconsistent with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 56 the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one;

(*a*) As between States parties to both treaties the same rule applies as in paragraph 3;

(*b*) As between a State party to both treaties and a State party only to the earlier treaty, the earlier treaty governs their mutual rights and obligations;

(*c*) As between a State party to both treaties and a State party only to the later treaty, the later treaty governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 37, or to any question of the termination or suspension of the operation of a treaty under article 57 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

The consideration of this Article gave rise to considerable discussion in the Commission. The view prevailed that the question was essentially one

of priority and, in the case of a material conflict between two treaties, one of State responsibility. In the earlier discussions and in Sir Gerald Fitzmaurice's Third Report, a distinction was made according to the nature of the treaty. Sir Gerald distinguished between treaties of the mutually reciprocal (*do ut des*) type (such as the Vienna Convention on Diplomatic Relations), interdependent treaties (such as Disarmament Treaties and the Treaty on Antarctica), and treaties of the integral type (such as the Conventions in the field of Human Rights and the Red Cross Conventions).[1] As, however, Sir Humphrey Waldock pointed out, while this distinction was valid, there were many treaties of a mixed type.[2]

The draft articles in their final form do not distinguish between types of treaties. Both the Convention and the Protocol are largely treaties of the integral type, but they also contain provisions of an interdependent nature, in particular the provisions relating to travel documents (Article 28 and the Schedule to the Convention). Since the material provisions of both treaties are identical, it might appear that no conflict is likely to arise. The possibility nevertheless exists in view of the difference of the provisions relating to reservations. Both treaties permit unilateral reservations and exclude the same material provisions of the Convention from reservations.[3] A difference exists in so far as Article 35 of the Convention, dealing with co-operation with the United Nations, may be subject to reservations under the Convention, but is excluded from reservations by virtue of Article VII of the Protocol. No State party to the Convention has, however, so far made a reservation to Article 35 of the Convention, a provision which deals with the relations between the States parties and the United Nations. The difference is, therefore, not likely to lead to any conflict. Article 38 of the Convention, on the other hand, dealing with the settlement of disputes, and providing for the compulsory jurisdiction of the International Court of Justice in the case of disputes between parties relating to its interpretation or application which cannot be settled by any other means, is excluded from reservations under the Convention but may be subject to reservations under the Protocol by virtue of Article VII. This was introduced in the light of comments of governments, in the interest of universality of the treaty, threatened by the known disinclination of certain States to accept the compulsory jurisdiction of the World Court.

As the Convention and the Protocol cover partly the same ground, there

[1] Third Report, by Sir Gerald Fitzmaurice, *Yearbook of the International Law Commission* (1958–II), pp. 27–8.

[2] In his Second Report, comment on Art. 65, ibid. (1963–II), paras. 22–7, pp. 58–60.

[3] Cf. Part II, Section 2, of the draft articles on the Law of Treaties, Reservations to Multilateral Treaties, Art. 17 (acceptance of, and objection to, reservations) para. 1: 'A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.'

exists a possibility of different and, indeed, conflicting reservations being made on the same subject-matter under the Convention and the Protocol. This is dealt with in Article VII of the Protocol which provides explicitly that reservations made to the Protocol under this Article shall not, in the case of a State party to the Convention, extend to refugees in respect of whom the Convention applies: *prior tempore potior jure*. Thus, in the case of a dispute between States which are parties to both the Convention and the Protocol and one of which has made a reservation under the Protocol as to the Court's jurisdiction, the latter would not be competent if the dispute concerned refugees in respect of whom the Protocol alone applied (post-dateline refugees); unless, of course, the States concerned have accepted the jurisdiction of the Court by general declarations under the Optional Clause (Article 36 of the Court's Statute), or by a *compromis*. This is in accordance with Article 26, paragraph 4 (*b*), of the draft articles (if we include the effect of reservations on the treaty relationship of the States concerned under successive treaties). Where the nature of the dispute is doubtful, as when it is not clear whether it affects the construction of the instrument in respect of those refugees to whom the Convention applies, or in respect of post-dateline refugees, and when the jurisdiction of the Court may be disputed by a party, the Court would, in accordance with Article 36, paragraph 6, of its Statute have itself to decide whether it has jurisdiction.[1]

The question of suspension or termination of the Convention may arise only when all the parties to the Convention have become parties to the Protocol. This matter is regulated by Article 56 of the draft articles. It was clearly the intention of the Assembly, as is also apparent from the *travaux préparatoires* and from the history of the Protocol, that the Protocol was not intended to replace the Convention, that it is a 'collateral treaty' and an *inter se* agreement which, in accordance with the rule *pacta tertiis nec nocent nec prosunt*, does not affect the rights and obligations of States parties to the Convention.

III. Conclusions

We have tried to examine in this article certain questions of the law of treaties in the light of a recent example: the Protocol relating to the Status of Refugees of 31 January 1967 established by the General Assembly of the United Nations. It has been seen that the Protocol makes the principles

[1] In the *Nottebohm* case, the Court considered this principle to be applicable to international tribunals in general: 'Since the *Alabama* case, it has been generally recognized, following the earlier proceedings, that in the absence of any agreements to the contrary, an international tribunal has the right to decide its own jurisdiction and has the power for this purpose to interpret the instruments which govern that jurisdiction' (*I.C.J. Reports*, 1955, p. 4, at p. 118).

of the 1951 Convention—which under the Convention itself constitute binding obligations only with regard to existing groups and categories of refugees—applicable to refugees in general. This is done without prejudice to the amendment of the Convention itself which, however, would require new ratifications or accessions and would thus detract from the wide acceptance it has received so far. There exists an obvious difficulty in securing the universal acceptance of such principles by means of a treaty in an international community, the membership of which has so vastly increased and is continuing to increase by the further emergence of newly independent States. In this context, the *inter se* agreement constitutes, as we have seen, a method of bringing multilateral treaties up to date. The Protocol, as has been explained, is of a dual nature: as between States parties to the 1951 Convention it is an *inter se* agreement; for States not parties to the Convention it is an independent multilateral treaty. As to their material content, both the 1951 Convention and the 1967 Protocol belong to the type of multilateral treaties which lay down general principles and standards for the treatment of individuals.

Multilateral treaties are acquiring an ever-increasing importance and scope. International organizations owe their existence to multilateral treaties, and multilateral treaties established both under the auspices of international organizations and outside them regulate in a growing measure not only the relations between States but also human relations and activities. It has been said that 'as the nearest substitute to international legislation, the international treaty is an indispensable and exclusive way of implementing international organization . . . (and) an indispensable instrument for the implementation of international welfare and cooperative objectives'.[1] It is, however, difficult to speak of international legislation in the true sense of the words. While certain trends to move away from the unanimity principle in the law of treaties have been widely emphasized,[2] these trends have so far mainly extended to the drafting process, the revision provisions of multilateral treaties, particularly the constituent instruments of international organizations, and the question of the validity and acceptance of reservations to such treaties. It is possible to speak in certain instances of 'quasi-legislative drafting within international organizations'.[3] However, the unanimity principle in the requirement of the consent by each individual State to be bound by the treaty obligations remains valid.[4]

[1] W. Friedmann, *The Changing Structure of International Law* (London, 1964), p. 124.

[2] See *inter alia* Friedmann, op cit., p. 126, and Edwin C. Hoyt, *The Unanimity Rule in the Revision of Treaties—a Re-examination* (The Hague, 1959).

[3] Cf. Clive Parry, loc. cit., p. 189.

[4] R. Higgins, op. cit., p. 344; cf. *Reservations to the Genocide Convention, I.C.J. Reports*, 1951, p. 21: 'It is well established that in its treaty relations a State cannot be bound without its consent'.

As to the practice of the United Nations in establishing multilateral treaties, two procedures have usually been followed: reference to a diplomatic conference or 'adoption' by the General Assembly. In the latter case, the wording of relevant General Assembly resolutions has varied. In the case of the Protocol relating to the Status of Refugees, General Assembly Resolution 2198 (XXI), while not 'adopting' or 'approving' the treaty, has the same legal connotation as other resolutions of the General Assembly for the adoption of multilateral treaties: termination of the drafting stage by the establishment of the final text of a projected treaty which, usually by transmission to governments through the Secretary-General, is proposed to governments for acceptance, for their consent to be bound by the treaty. What is, in fact adopted by the General Assembly is not the treaty but the text of the proposed treaty.

As regards the amendment of multilateral treaties, the special procedures applied by the United Nations for the amendment of treaties established under the auspices of the League of Nations have been mentioned. There exists, as yet, little experience where the amendment or modification of treaties established under the auspices of the United Nations is concerned. The period of validity of the Convention on the Declaration of Death of Missing Persons,[1] which was adopted by a United Nations Conference of Plenipotentiaries, for instance, was extended by two Protocols dated 16 January 1957[2] and 15 January 1967. These Protocols were drafted by the Secretariat at the request of a party, circulated to other parties, and subsequently to States entitled to become parties, without reference to the General Assembly.

Different and varying techniques have thus been applied by the United Nations both as regards the establishment and the modification of multilateral treaties. It is doubtful, as has rightly been pointed out, whether too much rigidity in the treaty law activities of the United Nations is desirable or even possible.[3] In other inter-governmental organizations, whose constitutions do not provide for a specific procedure for the adoption of treaties, the techniques have also varied.[4] The method followed for the extension of the personal scope of the 1951 Convention relating to the Status of Refugees by the establishment of the 1967 Protocol is just one more example of the flexible and variable methods which are employed by the United Nations in this field.

[1] *United Nations Treaty Series*, vol. 119, p. 99, No. 1610.

[2] Ibid., vol. 258, p. 392.

[3] Cf. Rosenne, loc. cit., pp. 436–7.

[4] A rather unusual method followed for the adoption of the Convention for the Establishment of a Centre for the Settlement of International Investment Disputes prepared by the International Bank for Reconstruction and Development was mentioned by Mr. Rosenne in the International Law Commission in connection with Art. 8 of the draft articles: 782nd meeting, para. 67, *Yearbook of the International Law Commission* (1966–I), p. 47.

One difficulty which exists in the case of multilateral treaties established under the auspices of the United Nations embodying principles intended to be of universal application is the lack of co-ordination between the 'negotiation' and the 'conclusion' phases. Once the text of a multilateral treaty has been adopted by the General Assembly, or by a diplomatic conference convened by the Economic and Social Council or the Assembly, the United Nations have no direct influence on securing universal acceptance, and ratifications or accessions are often far from universal. The General Assembly has in certain cases tried to overcome this difficulty by appealing to States to adhere to the treaty and by requesting the Secretary-General to report on the state of ratifications and accessions.[1]

It may not be out of place to refer to a practice which has, as is known, sometimes been resorted to by the General Assembly when it desired to lay down principles of universal application, particularly in the field of human rights: the adoption both of declarations and of multilateral treaties on the same subject. The first and foremost example of such declarations is, of course, the Universal Declaration of Human Rights.[2] While the Declaration was adopted in 1948, it was not until eighteen years later that the General Assembly adopted the International Covenants on Civil and Political Rights and on Social, Economic and Cultural Rights. Other examples are the Declaration on the Elimination of all Forms of Racial Discrimination,[3] which was followed in 1965 by a Convention on the Elimination of all Forms of Racial Discrimination,[4] the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, and the 1965 Recommendation on the same subject.[5]

Outside this field, in a new domain of international law, the Declaration on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space[6] and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies,[7] are an important example of this practice. The Declarations, being resolutions of the General Assembly, are not legally binding on States; they are nevertheless of legal significance.[8]

[1] Cf. for instance, Resolutions 2221 (XXI) and 2337 (XXII) on the Human Rights Covenants. As regards treaties relating to refugees, the Statute explicitly charges the High Commissioner for Refugees with the function of '*promoting* (italics added) the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto'; see above, p. 41.

[2] G.A. Resolution 217 (III) of 10 December 1948.

[3] G.A. Resolution 1909 (XVIII) of 20 November 1963.

[4] A Declaration and a Convention on the Elimination of all Forms of Religious Intolerance are still in the drafting stage.

[5] G.A. Resolution 2018 (XX) of 1 November 1965.

[6] G.A. Resolution 1962 (XVIII) of 13 December 1963.

[7] Annex to G.A. Resolution 2222 (XXI) of 19 December 1966.

[8] In the course of the consideration by the First Committee of the General Assembly of the Declaration on Legal Principles Governing the Activities of States in Outer Space, several

The Universal Declaration, in particular, has influenced national laws and constitutions; it has been incorporated or referred to in international legal instruments and its principles have received wide recognition.[1]

Multilateral treaties may constitute a confirmation of existing general rules of international law or they may create new norms.[2] Whether a treaty belongs to the first or second category is, of course, a difficult question to answer in the absence of judicial determination.[3] It depends on the *opinio juris sive necessitatis*. There is obvious interaction between custom and treaties. States will be more inclined to accept treaty obligations when the principles embodied in the treaty have already developed to the extent of acquiring a measure of legal character and the incorporation of principles in general multilateral treaties is bound to influence the development of customary law. The dual embodiment of principles by such a representative and authoritative body as the General Assembly of the United Nations in declarations and treaties is bound to facilitate the development of customary law on the subject-matter.

Some of the practices and trends described may be difficult to reconcile with traditional concepts of international law. They are the result of the changing structure of the international community consisting in the vast increase of the number of States forming this community and their ever greater interdependence, which finds expression in the creation of international organizations and the growing importance of their role. They are reflected in the development of international law, but this evolution is bound to be slower.

The draft articles on the Law of Treaties prepared by the International Law Commission take account of these various developments. The effort of codification in this field constitutes a major undertaking which is obviously fraught with difficulties in view of the conflicting trends existing at the present stage. In this and other fields of international law we live in a period of transition in which international law has been described as an

representatives expressed the view that the Declaration established legal principles. *G.A.O.R.*, First Committee, 1342 and 1343 meetings, Docs. A/C. 1/SR. 1342 and 1343.

[1] On the legal significance of the Universal Declaration of Human Rights, cf. Sir Humphrey Waldock's 'General Course on International Law' *Recueil des cours* (1962–II), pp. 189–99, and his 'Human Rights in Contemporary International Law and the Significance of the European Conventions', *The European Convention on Human Rights* (*International and Comparative Law Quarterly*, *Supplementary Publication*, No. 11 (1965), pp. 13–15); E. Schwelb's 'The Influence of the Universal Declaration of Human Rights on International and National Law', *Proceedings of the American Society of International Law at its Fifty-third Annual Meeting* (Washington, 1959), pp. 127–229, and his 'Die Fortentwicklung des Völkerrechts durch die Vereinten Nationen', *Archiv des Völkerrechts*, 13 (1966), pp. 14–22.

[2] Cf. M. Lachs, 'Le développement et les fonctions des traités multilatéraux', *Recueil des cours* (1957–II), p. 330.

[3] Cf. the standard formula in the Conventions adopted by the 1930 Hague Codification Conference: 'The inclusion of the above-mentioned principles and rules in the Convention shall in no way be deemed to prejudice the question whether they do or do not already form part of international law.'

international law expanded in scope representing 'the common law of mankind in an early stage of development, of which the law governing the relations between States is one, but only one, major division'.[1] Whether this evolution will, in fact, lead to the abandonment of the unanimity principle in the law of treaties, to international legislation in the proper sense of the term, remains to be seen. The different techniques employed in the treaty-making process in the present stage are symptomatic of these general developments.

APPENDIX

Protocol Relating to the Status of Refugees

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

Article I

General Provision

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and . . .' and the words '. . . as a result of such events', in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (*a*) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol.

Article II

Co-operation of the National Authorities with the United Nations

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

[1] C. W. Jenks, 'The Scope of International Law', this *Year Book*, 31 (1954), p. 46.

2. In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(*a*) The conditions of refugees;

(*b*) The implementation of the present Protocol;

(*c*) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article III

Information on National Legislation

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article IV

Settlement of Disputes

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article V

Accession

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article VI

Federal Clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(*b*) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(*c*) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article VII

Reservations and Declarations

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16, (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

2. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

4. Declarations made under article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply *mutatis mutandis* to the present Protocol.

Article VIII

Entry into Force

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article IX

Denunciation

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article X

Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications elating hereto.

Article XI

DEPOSIT IN THE ARCHIVES OF THE SECRETARIAT OF THE UNITED NATIONS

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in article V above.

A *CAUSE CÉLÈBRE* IN THE HISTORY OF TREATY-MAKING: THE REFUSAL TO RATIFY THE PEACE TREATY OF REGENSBURG IN 1630*

By D. P. O'CONNELL

Professor of International Law, University of Adelaide;
Associate of the Institute of International Law

I. The Historical Context and the Legal Issues

It is well known that the form and extent of full powers was a major preoccupation of the plenipotentiaries at the Peace Conference of Münster, which commenced in 1644; and, though international lawyers have given surprisingly little attention to the question, it is recognized that the international law rules of treaty-making were clarified and to some extent settled during the two years it took to scrutinize the plenipotentiaries' full powers.[1] Why this scrutiny was so meticulous has not been discussed. It would seem that caution had been engendered by the grave diplomatic contretemps issuing from Cardinal Richelieu's repudiation of the Peace Treaty of Regensburg in 1630; and an examination will tend to show that this event was decisive in the evolution of rules of treaty-making, and in the transformation of these rules from standards of moral conduct into rules of international law. The story is piquant because Grotius became involved in a difference of opinion on the point with Richelieu's Grey Eminence, Père Joseph.

In order to understand the issues arising at Regensburg it is necessary to mention an earlier event, the Peace Treaty of Monzon in 1626, which was supposed to settle the question of suzerainty over the Valtelline, but which, due to ambiguous draftsmanship, in fact left it open. The Valtelline is a valley which runs east from Lake Como, and at the commencement of the Thirty Years War was the principal avenue of military and political communication between the Spanish Milanais and the Spanish Netherlands, and between the Spanish Habsburgs and the Austrian Habsburgs. It had belonged to Milan before the Duchy fell to Spain, but in 1513 Maximilian Sforza had ceded suzerainty over it to the Swiss Union of the Grisons. Its juridical situation was thus ambiguous: it was still Milanais, but it was at the same time a vassal of the Swiss. The Spanish sovereigns and the Swiss suzerains each claimed concurrent and incompatible rights. This was sufficient reason for trouble, but the difficulty was compounded by the fact that, while the Valtelline remained Catholic, the Grisons became

* © Professor D. P. O'Connell, 1968.

[1] Mervyn Jones, *Full Power and Ratification* (1946), p. 5.

Protestant. When, in 1616, the Grisons granted Venice access through the Valtelline the Spaniards blocked the alpine passes and cut all communication between the Grisons and Italy. In 1617 the Government of the Grisons was forced by this economic strangulation to sign a treaty which guaranteed Spanish rights of passage through the passes, but the citizens of the Union refused to ratify it in democratic assembly, resolving instead to carry the fight into the enemy camp by a missionary campaign in the Valtelline. This led to war between Spain and the Grisons, and the latter invoked its treaty of protection with France, which had been ratified by Henri IV in return for the grant to France of a monopoly of military recruitment in the Grisons.[1]

This appeal had been acknowledged by the Government of France before Richelieu came to power in 1624.[2] The political reasons why the Cardinal responded to it are outside the scope of this discussion, and it is sufficient to mention that French troops were marched across Switzerland and into the Valtelline, from whose forts they expelled the papal troops who were holding the territory as stakeholders. This dramatic and energetic action was followed by two years of recrimination in a triangular diplomatic confrontation of Spain, France and the Pope. Since the Holy See and France were at issue on the question of the degree of political autonomy necessary to guarantee Catholicism in the Valtelline, and France and Spain were at issue on the question of the right of passage through the passes, it seemed logical to Richelieu that these two issues should be separated and negotiated directly with Rome and Madrid. In this Richelieu was the victim of his own diplomacy, for the French ambassador in Madrid, the Comte de Fargis, dismayed at the spectacle of France in opposition to the Pope, refused to disentangle the issues, and, apparently without full powers, and without communicating the text in advance, proceeded to sign a treaty with Spain. This contained the impossible condition that the Grisons should forfeit their title to the Valtelline in the event of their not observing the other provisions, and Richelieu refused to accept the text as it stood. However, the opposition at home to his Valtelline policy, and the outbreak of war with the Huguenots, made it desirable to compromise. Fargis was given new instructions which reached him while he was accompanying the Spanish court on the first official visit of Philip IV to Aragon, and he was told that if Spain refused to modify the treaty he was to break off relations and return home. In fact, at Monzon on 5 March 1626, Philip IV accepted a new French text of the treaty.[3]

Since the loose drafting permitted either party to interpret it in its own

[1] Tapié, *La Politique étrangère de la France et le début de la guerre de trente ans, 1616–21* (1934).

[2] Treaty of 7 February 1623 for the restitution of the Valtelline between France, Venice and Savoy, Dumont, *Corps universel de droit diplomatique et de droit des gens*, vol. 5, p. 417.

[3] Ibid., p. 487.

interest, the treaty in fact settled nothing; on the contrary, as each party in the diplomatic entanglements of the next decade accused the other of being in breach of its engagements it became an obstacle to mutual comprehension and good will. Too many of Richelieu's treaties were ambiguous and enshrined a naïve hope that the French interpretation would prevail, but the Treaty of Monzon is the worst example. It did not specify that the Spaniards should not use the mountain passes—if it had they would not have signed it; hence it did not on the face of it interrupt Spanish traffic with the Rhine and the Tyrol, which was, of course, the crux of the matter. Richelieu hoped it might have this effect obliquely by virtue of the provision that the Valtelline should be restored to its legal condition before the troubles began in 1617; this implied acknowledgment of the superior authority of the Grisons over the passes, and their right to close them to Spanish armies. But the same provision stipulated that the Catholic religion should alone be practised in the Valtelline, and that the people of the Valtelline should elect their own officers of government, leaving the Grisons a nominal right of suzerainty and veto. As interpreted by Madrid, this meant that the Catholics of the Valtelline were free to make the decision to permit Spanish passage through the area, and the Grisons had no superior authority to prevent this; if France backed the Grisons in closing the passes, therefore, she would be in breach of the treaty.

This was not the end of the ambiguity. The treaty did not mention French rights of passage and recruitment in the Grisons or the French protection of Swiss neutrality. Therefore, in Spanish eyes, the treaty excluded France from all rights in the Valtelline, for she could enjoy rights only when derived from the Government of the Grisons, and these rights would be restricted to the canton itself. The undertaking that France gave to hand back the forts to the Pope was on its face compensated for by the provision that within a specified time they should be demolished. This gave the treaty the appearance of a French diplomatic coup, for it undid the Spanish action which had provoked the crisis. But since the French withdrawal would inevitably be followed by permission from the authorities in the Valtelline for Spanish passage it was exactly the contrary. Furthermore, should Spain in the future force the passage of the Splügen so as to open the shortest route to the Rhine, France would have no status under the treaty to object. This is, in fact, precisely what the Spaniards did, and they scoffed whenever Richelieu denounced their breach of the treaty. Wishful thinking, he was to find, is no substitute for black and white commitments.

There is little doubt that Richelieu was in his policies influenced by the failure of the Treaty of Monzon to settle the disputed right of Spanish passage through the Valtelline, and that he resolved not again to be snared

by ambiguous and compromising formulas. The Treaty of Monzon is thus an overture to the scene to be enacted in 1630 at Regensburg. There the imperial diet had been summoned for several purposes, the principal of them being the election of the Emperor's son as King of the Romans; and to Regensburg were sent two French delegates, Brulart de Léon, the French ambassador to the Swiss, and Père Joseph, with the primary object of inducing the Electors to refrain from this election. In order to place in perspective the motives for Richelieu's repudiation of Brulart and Père Joseph some additional historical facts will have to be mentioned.

In 1629 the Duke of Mantua died, and the succession was disputed between the Duke de Nevers, who was of the French branch of the Gonzagas; a niece of the Duke of Savoy; and the Duke of Guastalla who was a Spanish candidate. On his deathbed the moribund Duke made Nevers his heir, but believing Nevers would be a Trojan horse of the French in Italy the Duke of Savoy and Gonzalo de Córdoba, the Spanish governor of the Milanais, conspired to partition the Duchy of Mantua by seizing its dependency, the Marquisate of Montferrat. It so happened that the capital of Montferrat, Casale, had the finest citadel in northern Italy, and whoever held it dominated the Po valley and the road between Genoa and Milan. Mantua and Montferrat were imperial fiefs, and, while Gonzalo de Córdoba besieged Casale in an act of frank aggression, the Aulic Council, meeting in Vienna, decreed the sequestration of the Duchy and Marquisate pending settlement of the legal questions involved in the succession.[1] Two French military expeditions were mounted, one in 1629 and one in 1630. The first forced Savoy out of the war and raised the siege of Casale; the second was necessitated by a Spanish renewal of the siege. By the middle of 1630 a military stalemate existed in northern Italy, and in July Mantua was plundered and ruined by imperial troops and Nevers taken prisoner.

To an international lawyer part of the fascination of the Thirty Years War derives from the circumstance that juridical issues provoked political crises, which in turn assumed juridical form, and, by making political issues intractable, generated their own logic of commitment. The Valtelline affair was at bottom a question of strategy—Spanish encirclement of France in French eyes, Spanish logistics in Spanish eyes—but it took on a juridical aspect due to the ambiguous status of the territory and the ambiguous implications of French treaty-rights and obligations in the Grisons. The Mantuan affair was no less a question of strategy, and it too took on a juridical aspect due to the revival of imperial claims of territorial supremacy and French opposition to the validity of those claims, or at least of the implications to be drawn from them in the succession dispute.

[1] Alvarez, *Don Gonzalo Fernández de Córdoba y la guerra de sucesión de Mantua y del Monferrato, 1627–1629* (1955).

A third strategic issue was even more significantly juridical, and that was the issue of French rights in Lorraine.[1] Lorraine consisted in fact of two Duchies, Lorraine proper and Bar. In Lorraine the salic law prevailed, which meant that only males could inherit; in Bar it did not prevail, which meant that more remote male heirs would be superseded by less remote female heirs. The late Duke Henri had left two daughters, Nicole and Claude, and in order to preserve the unity of the inheritance Charles, his nephew, had married the elder of these. It was unfortunate for him that he could not marry both, for it was possible that the feudal law of co-parcenary prevailed in Bar, so that the two daughters would inherit jointly. To complicate the matter, Bar was a fief of France, and the heir was required to pay homage to the French king before being invested; Lorraine was part of the Holy Roman Empire, but it was arguable that it was in addition a French fief; and, in fact, Richelieu, basing himself on extensive historical researches and legal opinions, chose to treat Lorraine as a vassal State. Whatever the situation, Charles, as ruler of Lorraine and Bar, was a two-headed Janus, expected simultaneously to look to Vienna and Paris. When Louis XIII, in view of the dubious legal situation, made difficulties over Charles's investiture in Bar in 1625, the new Duke chose to concentrate his gaze to the east.

The matter was complicated by a long-standing dispute between France and the Emperor over the legal situation of the three Bishoprics of Toul, Metz and Verdun. These, with their important fortresses guarding the vulnerable eastern frontier of France, had been transferred to the French Crown in the Treaty of Câteau Cambrésis in 1559, but whether they were held by France as fiefs of the Emperor, and were still imperial territory, was an open question. They were surrounded by the hereditary lands of Lorraine and Bar, and the Bishopric of Metz had certain feudal dependencies, two of which, Vic and Moyenvic, were second-class fortresses dominating the main road between Nancy and Strasbourg. Had these been included in the cession of Metz to France? If they had, then the French had several footholds deep in Lorraine and imperial territory. It so happened that Richelieu had set up a commission to investigate certain alienations of land from the Bishopric of Metz, and when the commission reported it raised questions about French legal interests in Lorraine which the Government of Lorraine had considered, or had hoped, to be dead.

The legal dispute concerning Lorraine was generated by the concept of territorial sovereignty, which, with its implication of a power beyond which

[1] D'Haussonville, *Histoire de la réunion de Lorraine à la France* (1854–9); Zeller, *La Réunion de Metz à la France* (1926). The legal documents on the Lorraine dispute are contained in *Archives du Ministère des Affaires Étrangères: correspondance politique, Lorraine*, vols. 17, 19.

there is no appeal, had crystallized in the interval between the Treaty of Câteau Cambrésis and the accession to power of Richelieu.[1] For a generation French writers had utilized the expression *souveraineté* in this sense of ultimate legal authority over territory, and they had given it a new dimension by linking it up with the concept of the fundamental law of the realm.[2] The result of this association was the notion, adhered to with dogmatic conviction by the lawyers, and exploited as politically opportunistic by Richelieu, that what is governed by the Crown is governed absolutely on behalf of the French people, and is inalienable without their total consent: the three Bishoprics, with their dependencies, were French, and the Emperor had no rights respecting them because his predecessors had ceded them to France in full sovereignty.[3] The indignation of both Richelieu and the lawyers was therefore great when, at the request of the Duke of Lorraine, and as a strategic countermove to the French intervention in the War of the Mantuan Succession, the Emperor placed garrisons in Vic and Moyenvic, which he claimed to be imperial territory, and which France claimed to be French territory.

II. The Drafting of the Treaty of Regensburg

When Brulart and Père Joseph appeared at the Diet of Regensburg in August 1630 there were, therefore, three issues of law outstanding between France and the Habsburgs: the interpretation of the Treaty of Monzon in relation to Spanish passage through the Valtelline; the validity of the imperial sequestration of Mantua in face of Nevers's rights to inheritance under the deceased Duke's will; and the disputed status of the three Bishoprics. Brulart was armed with general instructions which, according to the practice of the time, he could exhibit publicly. He also had additional secret instructions on how to conduct himself in negotiation with each of the Electors.[4] These documents were dated 28 June 1630 from Grenoble

[1] Suarez refers to *imperium* in the sense of ultimate legislative competence, *De Legibus ac Deo legislatore*, III. i. 10, but he appears to include ultimate competence over territory in his discussion of imperium as the index of a perfect State, beyond which there is no appeal: in *De triplice virtute theologica, fide, spe et charitate* (1621), *Disputatio* XIII, ii. 4.

[2] Bodin's famous definition 'république est un droit gouvernement de plusieurs mesnages, et de ce qui leur est commune, avec puissance souveraine', *Six livres de la république*, p. 1, had a powerful influence on the next generation. For example, Loyseau wrote that sovereignty is 'la forme qui donne l'estre à l'Estat, mesme l'Etat et la souveraineté prise in concreto sont synonimes et l'Estat est ainsi appellé, parce que la Souveraineté est le comble et la période de la puissance, ou il faut que l'Estat s'arreste et s'establisse', *Les Traitez des seigneuries* (1608), p. 8. Cardin Le Bret defined sovereignty as 'une supreme puissance déferée à un seul, qui luy donne le droit de commander absolument', *De la Souveraineté* (1632), p. 1. And again 'le roy est le seul souverain dans son Royaume', ibid., p. 71. Concerning fundamental law Loyseau wrote that among the kinds of law are 'les loix fondamentales de l' Estat, pour ce que le Prince doit user de sa Souveraineté selon la propre nature', op. cit., p. 8.

[3] A view forcefully presented by Hersent, *De la souveraineté du roy à Metz* (1632).

[4] This practice was usual: Mattingley, *Renaissance Diplomacy* (1955), p. 112.

where Richelieu with the King was supervising the military and diplomatic activities of the Mantuan War. The instructions[1] dealt exclusively with French policy towards the Electors and with the attitude Brulart should strike in respect of each of them. The only mention of the Mantuan War appears incidentally: Brulart was told that the obligation which Louis XIII had to defend his allies in Italy against the unjust oppressions of Spain should not prevent him from acting energetically for the good of Germany, provided the Electors proved amenable; but that it should be made clear that, in the event of the Emperor's ministers' continuing the troubles in Italy, France was capable of a diversion on the frontier of Champagne. This threat should be used to press the Emperor to make a good and secure peace, to which even the Spaniards would be bound. There was certainly nothing in these instructions to authorize Brulart to make a treaty without reference back to Richelieu.

Brulart was also issued with credentials,[2] as was Père Joseph.[3] The latter, though not empowered to treat, eventually eclipsed Brulart in the negotiations, and the imperial plenipotentiaries took his credentials as sufficient evidence of authority. The exact significance of full powers was thus obscured in the steps leading to Père Joseph appending his signature to the text of the treaty after that of Brulart. Père Joseph's credentials, which are to be found in the records of the negotiations kept by the imperial plenipotentiaries, were as follows:

Tres hault, tres excellent et tres puissant prince nostre tres cher bon frere et cousin, pour rendre a Vostre Majeste un tesmoignage tres asseure du desir que nous avons de voir sortir de la diette eslectoralle qui doibt estre tenue a Ratisbonne les bonnes resolutions qui sont attendues pour le bien de l'empire, et d'y contribuer tout ce qui peut dependre de nous, outre le sieur de Léon Brulart, conseiller en nostre conseil d'estat que nous envoyons nostre ambassadeur extraordinaire en cette assemblee. Nous avons resolu d'y faire retourer avec luy de nostre part le R. pere Joseph l'un de nos predicateurs ordinaires affin que selon la confiance tres particuliere que nous avons en luy, il vous puisse faire cognoistre les sinceres intentions que nous avons pour le bien general des affaires et pour vostre particulier contentement, qui vous dira tousjours en la mesme consideration que nostre propre, ainsi que le dit Pere Joseph vous dira plus particulierement de nostre part, auquel nous vous prions de donner entiere creance, que nous prions dieu tres hault, tres excellent, et tres puissant Prince nostre tres bon frere et cousin vous avoir en sa sainte garde, escrit a Grenoble ce xxix[e] de Juin 1630.

Vostre bon frere et cousin
LOUIS

[1] They are published in Albrecht, *Die Politik Maximilians I. von Bayern und seiner Verbündeten 1618–1651: Briefe und Akten zur Geschichte des 30 jährigen Krieges*, 2nd part, vol. 5: *1629–1630* (1964), p. 423.

[2] A copy exists in Vienna: *Haus-, Hof- und Staatsarchiv, Friedensakten* (*Reichskanzlei*), 9a I, fol. 23.

[3] Ibid., fol. 31.

When the documents just mentioned were drafted Richelieu considered the Mantuan question as very incidental to Brulart's principal mission of persuading the Electors not to proceed to the election of the Emperor's son, and not to go to war with Holland and Sweden as the Emperor wished them to do. By the time Brulart and Père Joseph began their discussions with the imperial plenipotentiaries in Regensburg, however, Mantua had been captured, the Mantuan situation had become critical and its settlement had become a matter of paramount importance. Brulart's instructions on the point were inadequate, and it was not very clear that 'peace in Italy' might not include, as a condition for a satisfactory settlement of the Mantuan question, concessions by the French elsewhere. Whether Brulart was authorized to sign a treaty—and the extent to which he was so authorized—would appear to turn, not on the instructions, but on the full powers issued to him. In respect of these there is a mystery. No copy of them exists in the Archives of the French Foreign Ministry. Two copies in French were, however, located by a German research student some sixty years ago in the archives in Munich and Dresden, both bearing the date 28 June 1630 and both carrying copies of the signature of Claude Bouthillier, the Secretary of State, but not a copy of the King's signature.[1] Another copy, this time in Latin but bearing the same date and a copy of only Bouthillier's signature, exists among the files of the Regensburg negotiations in Vienna.[2] Are these copies of the full powers on which Brulart based his authority to sign? If they are, did he in fact bring them with him along with the instructions of 28 June, or did they arrive later back-dated? Or were there other full powers sent subsequently? And if so, was the text altered? In determining the scope of Brulart's authority it is necessary to establish that these copies, the only ones known to exist, are copies of the final text of the full powers

[1] Keller, *Die Friedensverhandlung zwischen Frankreich und dem Kaiser auf dem Regensburger Kurfürstentag, 1630*. Thesis (1902), p. 20.

[2] *Haus-, Hof- und Staatsarchiv, Friedensakten* (*Reichskanzlei*), 9a I, fol. 23. The relevant part of the text is as follows: 'Ludovicus Dei gratia Rex Franciae et Navarrae, universis praesentes inspecturis salutem. Resolvimus cum ad Collegium Electorale Ratisbonae congregandum D. de Leon Brulard Consilimmi ord. Consilii Nri status et Privatum Legatum Nrum Extraordinarium expediremus, plenipotentiam illi concedere tractandi Pacem Generalem in Italia, securi quod negociationem hanc usque adeo importantem committere non potuerimus in meliores manus quam dictum D. de Leon ob peculiarem Nrum fiduciam de illius fidelitate et affectione erga Nra Servitia et propter singularem eius experientiam in negotiis publiciis et arduis in et extra Regnum Nrum praeclaris experimentis contestatam. Quam ob rem dicto D. de Leon commissimus ipsumque deputavimus, committimus et deputamus per omnes praesentes manu. Nra, Subscriptas ut intelligat ex parte Impris et dictorum Electorum et simul ipsis representet Propositiones pro restabilienda Pace generali in Italia atque independentibus conferat, negocietur et tractet cum omnibus qui ad hanc rem sufficienter fuerint instructi concludat, resolvat, stabiliat et subsignet Nro nomine omnes scripturas, articulos et conclusiones pro dicta Pace assequenda factas. Promittentes in fide et verbo Regis gratum firmum et stablie semper Nos habituros quicquid per D. de Leon factum gestum negociatum conclusum et firmatum in hac materia fuerit. In quorum fidem sigilum Nrum praesentibus apponi iussimus Datum Grationopoli 28 die Junii Anno 1630. Ludovicus, Par le Roy, Bouthillier.'

communicated to the imperial plenipotentiaries. The French text is as follows:

Nous avons résolu envoyant au collège electoral qui doit être assemblée à Ratisbonne le sr de Léon Brulart conseiller ordinaire en nos conseils d'Etat et privé nostre ambassadeur extraordinaire de luy donner pouvoir de traicter de la paix générale d'Italie, asseuré ne pouvoir commettre en meilleure main cette negotiation importante. A ces causes nous avons le dt sr de Léon commis et deputé, commettons et deputons par ces presentes signées de notre main pour entendre de la part de l'Empereur et des dts électeurs et leur faire aussy toutes propositions pour le restablissement de la paix générale en Italie et de ce qui en dépend, conférer négocier et traicter avec toutes personnes qui auront de ce faire, bon et vaillable pouvoir, conclure, résoudre, arrester et signer en notre nom tous escrits articles traictez et accords pour ladte paix. Promettans du foy et parole de Roy avoir pour agreeable, tenir ferme et établir à tousjours tout ce qui par le dt sr de Léon aura este fait, géré, negocié, conclu et arresté sur ce sujet, car tel est notre plaisir. En tesmoing de quoy nous avons fait mettre notre scel. à ces dtes presentes. Donné à Grenoble le 28 jour de Juing l'an de grace 1630 et de notre regne le 20.

Par le Roy
Bouthillier

How it is that there are French and Latin versions of the same instrument cannot be established. But there are some clues in the diplomatic documents concerning the Regensburg negotiations which have survived to prompt the inference that their text is the only one of which the imperial negotiators had notice. When the French envoys had their first audience with the Emperor in Regensburg on 2 August 1630 they were asked if they had full powers, and they replied that they had power to accept reasonable conditions, subject to the reservation of submitting them to the King for confirmation prior to signature. On 11 August 1630 they sat down to their first discussions with the imperial commissioners, the Abbot of Kremsmünster, Count Questenberg and Count Nostitz, but it was only the next day that the question of full powers again arose. Did they have full powers, they were asked? Fagniez, who took his information from Lepré-Balin's contemporary manuscript life of Père Joseph in the British Museum, says that 'Brulart communiqua ses pouvoirs datés du 28 juin', but that he and Père Joseph regarded them as out of date and 'en attendaient d'autres qu'ils avaient demandés depuis dix jours déja'.[1] Count Khevenhüller, who recorded the Regensburg proceedings for the Emperor, has a different version of the meeting of 12 August. According to him Brulart was evasive about his full powers: 'He said there would be no insufficiency of full powers, but he had been sent on account of the Italian differences and he knew of no others.'[2] At this point Père Joseph took up the discussion,

[1] Fagniez, *Père Joseph et Richelieu* (1894), vol. 1, p. 453.

[2] Khevenhüller, *Annales Ferdinandei, oder wahrhafte Beschreibung Käyser's Ferdinandi* (1721–6), vol. 11, p. 1200.

adding that they had indeed full powers, but that these covered only an Italian peace and no longer corresponded with the altered circumstances. For this reason, he said, they had ten days previously asked for further full powers, and because even these would not appear to satisfy the wishes of the Emperor they were prepared to apply for even more far-reaching ones. Next day there was a private discussion between Père Joseph and Kremsmünster who reported that 'they had full powers to hand for the Italian affair, but that they were in the form in which they were drafted when the delegates left France. For this reason they had sent a courier and were shortly expecting their full powers.'[1]

It is possible that in saying that they had full powers already the French were merely procrastinating, with a view to keeping the negotiations going until they were in receipt of full powers, and that in fact they were not at that time empowered at all. This interpretation is supported by a dispatch of Richelieu written on 5 September 1630, in which he reported having told the imperial general in Italy, Collalto, that Brulart was not the bearer of any power to treat concerning peace, 'which', he added, 'is true'.[2]

Whether or not Brulart had full powers at the beginning of the negotiations it is clear that he had them at the end, for on 27 August 1630 Richelieu sent him a dispatch containing full powers and further instructions,[3] which reached Regensburg on 3 September 1630.[4] Three days later the Catholic Electors were informed that 'the Emperor has ordered the French delegates to exhibit their powers and has asked whether on the basis of this he should enter into negotiations, as the full powers are, 1. dated some time ago, 2. not signed by the King, 3. solely related to the Italian matter'.[5] Did this mean that the imperial plenipotentiaries had already seen the full powers, and if they had, that the instrument they had seen was that sent on 27 August or an earlier one? According to the minutes of the conference between the French and imperial plenipotentiaries of 14 September 1630 Brulart 'handed over a duplicate of his full powers signed by the French King, which had arrived by courier'.[6] Yet neither the Latin nor the French text bears the King's signature. Was there, then, another text of full powers which has disappeared? The answer is probably in the negative, for on 18 September 1630 the Emperor reported to the Electors that the imperial counsellors had been negotiating with the French concerning peace, not only in Italy, but in the whole Holy Roman Empire;

[1] Khevenhüller, op. cit., vol. 11, p. 1208.

[2] Avenel, *Lettres, instructions diplomatiques et papiers d'État, du cardinal de Richelieu* (1854–77), vol. 3, p. 897. This is confirmed by Brulart at the meeting of 9 September 1630: Albrecht, op. cit., p. 563.

[3] Ibid., p. 463.

[4] According to Fagniez's deduction, op. cit., p. 463.

[5] Munich, *Staatsarchiv*, 166/5, Keller, op. cit., p. 21.

[6] Now published in Albrecht, op. cit., p. 574. Albrecht refers back to Keller for the text: p. 563, A. 2.

and that 'during the negotiations full powers of 28 June had been exhibited on the French side', which had two defects, the relatively old date and the absence of the royal signature. The imperial plenipotentaries, it was said, had emphasized these defects, whereupon 'a few days later the French delegates had handed over another royal full powers, which in respect of date and contents were the same as the previous, but signed in the King's hand, and were said to have come by post'.[1]

It seems certain from this that there were two instruments, but that the later was no more than a copy of the earlier, rectified by the addition of the King's signature, and it may be that one copy was in French and the other Latin. If the text can be considered authentic its legal implications can be examined with a view to ascertaining whether Brulart was in fact restricted in his authority to conclude a treaty.[2] It is to be noted that Brulart was given power to 'treat of a general peace in Italy', and to 'make all proposals for the reestablishing of general peace in Italy and in matters depending thereon to confer, negotiate and treat'. The King's faith was promised and his word given to everything that Brulart might do, but this promise and undertaking must be construed as limited to a 'general peace in Italy.' What did a 'general peace in Italy' mean? In their report of 6 September 1630 the imperial counsellors referred to a deficiency in the full powers in that they were 'solely related to the Italian matter'. At that stage in the negotiations these officials were clearly unconvinced that the introduction of the adjective 'general' implied that peace in Italy could be conditional on a general peace in Europe. Yet when it came to the point they were prepared to sign a treaty which purported to be a general peace treaty for Europe, and to take refuge in the argument that power to make peace in Italy implied power to make commitments elsewhere on which peace in Italy might depend. One cannot escape the conviction that in this there was an element of sleight of hand on the Emperor's part.

Did Richelieu intend to restrict Brulart by the form of the full powers to a treaty dealing only with matters directly concerned with the settlement of the Mantuan question? In his dispatch of 27 August 1630 enclosing the full powers he described the latter as 'unlimited'.[3] Did he mean by this that Brulart was authorized to sign a treaty irrespective of its terms; or did he merely intend to release him from the necessity to refer back provided he conformed with his final instructions? The latter, enclosed with the full powers in the same dispatch,[4] commenced by reciting negotiations which

[1] Keller, op. cit., p. 21.

[2] The standard work of Klopp, *Der dreissigjährige Krieg bis zum Tode Gustav Adolfs* (1891–6), vol. 3, p. 544, assumes that the full powers extended to a universal peace; and on the basis of this Richelieu has been accused by the historians of deliberate breach of faith.

[3] Avenel, op. cit., vol. 3, p. 882, Cf. Richelieu, *Mémoires*, vol. 6, p. 282.

[4] Avenel, op. cit., p. 879.

had already taken place between Richelieu's agents and Collalto on the field in Italy with a view to peace, and then referred to a draft peace treaty which Richelieu had annotated and a copy of which was also enclosed. Brulart was clearly told that he was empowered provided only that he did not change the substance of the draft.[1] On 5 September 1630 further instructions were sent in which Brulart was told that it would be necessary to secure the retirement, through the agency of the Electors, of the imperial troops from Vic and Moyenvic and that a provision should be inserted in the draft treaty that neither France nor the Empire would molest places which they possessed before 1628, thereby restoring the *status quo ante* in Lorraine.[2] Also, though the Emperor had objected that he was not a party to the Treaty of Monzon there was no reason why he should not adhere to it with the consent of the parties, so committing him, in Richelieu's eyes, to an undertaking to close the Valtelline to Habsburg traffic.[3] Further reference to the execution of the Treaty of Monzon was made in a letter from Richelieu to Brulart of 8 October 1630,[4] which added that 'il seroit dangereux d'entrer en conférence sur le sujet de Moienvic'.[5] That the Cardinal was beginning to consider the question of Vic and Moyenvic as vital to the settlement of the Mantuan dispute is clear from his report to the Maréchal de Schomberg, French commander in the field in Italy, that Brulart had been charged to comprehend Vic and Moyenvic in any treaty he might negotiate.[6]

There is little doubt that Brulart and Père Joseph were more confused than assisted by these several instructions, for they by no means clarified what was in Richelieu's mind, which had been considerably altered since 28 June 1630 by events both in Italy and at Regensburg. During September 1630 the imperial plenipotentiaries increased the pressure on the French envoys to conclude a treaty; and to their dismay the latter found that the Catholic Electors, fearful of Gustavus Adolphus who had just landed in Germany, were supporting the Emperor in his persistence. It was just at this critical moment that Richelieu lost control of the situation, for Louis XIII was thought to be dying at Grenoble, and the Cardinal's enemies were already celebrating his downfall. After 19 September the French delegates in Regensburg heard nothing more from Richelieu. On the main point in the negotiations—the investiture of Nevers in the Duchy of

[1] Avenel, op. cit., p. 882: 'Le roy en laisse le pouvoir au sr de Léon, son ambassadeur, pourveu qu'il ne change rien en la substance dudit traitté qui blesse les intérests de ses alliez et sa dignité propre.' In his *Mémoires*, vol. 6, p. 282, Richelieu wrote: 'on envoya, dès le mois d'aout à Léon Brulart et audit père un pouvoir de faire la paix et les articles et instructions qui pouvaient donner lumière de ce qu'il falloit faire en vertu de ce pouvoir.'

[2] Avenel, op. cit., vol. 3, p. 899.

[3] Ibid., p. 900.

[4] Ibid., p. 932. This arrived in Regensburg, however, after Brulart had signed a treaty.

[5] Ibid., p. 936.

[6] Ibid., p. 927.

Mantua—they found the Emperor willing to yield provided France undertook not to support the Emperor's enemies elsewhere. It seemed to Père Joseph that a moral and satisfactory peace could be made. There is a danger that negotiators, after spending weeks in debate, will be reluctant to dissipate their efforts by insisting at the last moment on points on which no agreement is possible. Rather than put in jeopardy the advantages gained in negotiation they tend to compromise these points, and the pressure to do so becomes at times irresistible. Brulart and Père Joseph decided to exceed the letter of their instructions and sign a treaty. To them it seemed a good one. In Italy, the Spaniards would withdraw from Casale and the imperialists from Mantua, while the Emperor adjudicated the succession question. Once satisfactory provisions had been made with respect to the compensation and indemnities to the other claimants, Nevers would be invested in the Duchy. The French would withdraw from all Italy except from Susa and Pinerolo. Nevers would take possession of Casale without fortifying it. Savoy would keep Trino, and the revenues of Montferrat would be hypothecated to pay him an annual rental of 18,000 crowns. On the obverse side, Article 1 provided that France would not in any way assist the enemies of the Emperor; there was no settlement in Lorraine; on the contrary, the Duke of Lorraine was brought into the treaty, although he had not been party to the negotiations, and this implied the right of the Emperor to supervise matters in the Duchy.

Brulart alone had powers to sign, and Père Joseph at first refused to add his signature. The Electors and the Emperor's plenipotentiaries, however, were insistent that he, as a man sharing Richelieu's mind, should do so. On 13 October 1630 at nine in the morning Brulart and Père Joseph affixed their seals.[1] Within hours an imperial courier was on the way to General Collalto with a copy of the treaty and orders to permit Casale to be revictualled and reinforced, and instructions to cajole the Spanish into accepting the terms agreed upon.

III. The Refusal of Ratification and the Dispute

The Cardinal heard of the Treaty of Regensburg from a *résumé* of Brulart on 20 October when he was about to leave Lyons for Paris. He was delighted, and announced that it would be ratified. The dispatches containing the full text arrived two hours after the court had left Lyons, and caught up with it only two days later at Roanne, where the King and Richelieu were about to take a boat down the Loire. Richelieu was stunned as he read the instrument, and raising his hands to the sky in a gesture of frustration he declared he would refuse ratification. To the Venetian ambassador he said he would resign his office and retire to a monastery.

[1] Fagniez, op. cit., p. 492. The text is in Dumont, op. cit., vol. 5, p. 615.

The Treaty of Regensburg as it stood, was quite unacceptable. It purported to tie France's hand with respect to her friends and allies who were opposed to the Emperor, and would appear to the Dutch and to the King of Sweden, with whom Richelieu was negotiating, as a piece of double-dealing. At the same time it was an insufficient guarantee to France that these friends and allies would not henceforth be needed, for it left the Lorraine question open without removing all cause of friction in Italy. Richelieu sat at his travelling desk at Roanne and, as was his custom, argued on paper the reasons for not ratifying the treaty:

Le traitté est nul, attendu que le sr de Léon a excédé les fins de son pouvoir, qui n'estoit que pour traitter de la paix d'Italie, avec personnes qui auroient de ce faire bon et valable pouvoir.

En ce qu'il a traitté d'une alliance entre l'empereur et la France, bien que son pouvoir ne fust point à cette fin.

En ce qu'il a traitté des affaires de Lorraine, Toul, Metz, Verdun et Moyenvic, sans que son pouvoir luy donnast liberté de négotier sur telles affaires.

En ce qu'il n'a stipullé aucune ratification de l'empereur, ny du roy d'Espagne.

Et se peut dire que le traitté n'est point traitté, d'autant que l'empereur déclare, et le roy accepte, usant de ces termes: 'Imperator declarat et placet regi christianissimo.'[1]

Having thus analysed the reasons why the treaty was void, Richelieu then pondered what action he should take. He listed the possible attitudes as follows:

Ou ratifier ledit traitté avec modification qui explique les articles qui nous sont préjudiciables en un sans aucunement supportable; Ou faire une déclaration qui déclare le traitté nul et porte des offres raisonnables pour la paix; Ou ne faire ne l'un ne l'autre présentement, mais se réserver en pouvoir et estat de faire lequel on voudra.[2]

He concluded that

. . . on ne peut ratifier le traitté sans perdre l'honneur, noz alliez et toute créance envers eux . . . Quand on le ratifieroit avec des modifications, il est incertain si l'empereur le recevroit, et que nous ferions une lâcheté qui nous rendroit mesprisables à noz amis et ennemis . . . On croit qu'il faudra enfin faire une déclaration qui porte nullité du traitté, et contienne la continuation de la volonté que le roy a tousjours eue d'une bonne et juste paix, et des offres raisonnables pour parvenir à cette fin.

The King then wrote a blistering letter to Brulart which must have made the ambassador quake:

Lequel traitté est non seulement contraire à vostre pouvoir, aux ordres portés par vostre instruction, et à ceux que je vous ay depuis envoiés en divers temps, mais mesme contient plusieurs choses auxquelles je n'ay jamais seulement pensé et qui me sont si préjudiciables que je n'en ay pu entendre la lecture qu'avec un extresme desplaisir . . . Je vous diray seulement ce qui m'a esté de plus sensible, puisqu'il semble blesser ma foy, que j'ay gardeé et que je garderay tousjours inviolable.[3]

[1] Avenel, op. cit., vol. 3, p. 947. This is tentatively dated 21 October 1630.
[2] Ibid., p. 949.
[3] Ibid., p. 960. Dated 22 October 1630.

The Emperor's reaction to the French repudiation of the treaty was violent, but it is difficult to extract much legal significance from it. He did not formulate reasons for regarding the treaty as valid, but merely demanded its prompt execution.[1] The Pope was badgered to impose canonical sanctions on Louis XIII for breach of faith,[2] and the Emperor used the French failure to ratify as a reason for urging the Electors—in vain as it happened—to declare war on France during 1631.[3] From time to time the assertion was made that the treaty was valid and France was in breach of its provisions, particularly in July 1631 when a formal note to this effect was delivered by an imperial agent to Louis XIII.[4] In a further note of 5 February 1632, which is described in the French Foreign Office archives as 'in effect an apology to justify his arms', the Emperor said:

> However we hope that either from the very nature of the settlement by which agreement was reached at Regensburg concerning that war, or from our belief that that agreement should be carried out and from our faithful and unswerving observance of it, it can be evident that war was not carried on from any evil intention on our part, but rather for the sake of the administration of justice and for the sake of protecting our own rule in Italy.[5]

Also, the draft treaty of 1632 for a Habsburg League of Austria and Spain referred, in respect of Italian affairs, to the Peace of Regensburg as the 'precept' to be observed; and in respect of the Grisons that 'those things which were concluded in good faith at the drawing up of the Peace of Regensburg, and which have now been entrusted to execution will be faithfully observed'.[6]

IV. The Legal Context of the Dispute

Neither on the French nor on the imperial side in this dispute is there any indication that the parties thought in legal terms. Throughout their arguments they refer to moral obligation and to good faith, and it is significant that the Emperor proposed as a remedy for alleged breach of faith the imposition by the Pope of canonical penalties on Louis XIII. To this extent the issue was formulated in medieval terms. Gentili, dealing with

[1] Klopp, op. cit., vol. 3, pt. 2, p. 313.

[2] Ibid., p. 229.

[3] Ibid., p. 315. The full text is in *Friedensakten*, 9a I, letter of 24 August 1631 and reply of the Electors of 30 September 1631.

[4] *Ministère des Affaires Étrangères: correspondance politique, Allemagne*, 8, fol. 221, where Louis XIII is formally indicted: 'Notorium deinde est quam syncero affectu et studio S.C.M. iam inde a dicta pace Ratisbonae conclusa ad eius executionem intenderit quae ad eum finem vel egerit vel constituerit.' (Latin sic.)

[5] Ibid., fol. 224: 'speramus autem vel ex ipso Compositionis modo quo de illo Bello Ratisbonae transactum est, vel ex fide eius Compositionis exequendae nostra sanctaque et inviolata eiusdem observantia liquere posse, id Bellum a nobis non mala intentione ulla sed potius Iustitiae administrandae nostrique et Imperii in Italia conservandi causa fuisse gestum.'

[6] Ibid., fol. 229: 'Ea quae Ratisbonensis Pacis tractactione bona fide conclusa, jamque executioni mandata fuerunt sancte observabuntur.'

peace treaties, says that Baldus regarded them as contracts of strict law, but that he, Gentili, teaches the contrary. For 'the agreements of sovereigns are based upon good faith' and dependent on the customs and institutions of the nations:

> More abundant faith is demanded in the contracts of princes, as Baldus himself says; and the name of treaty (*foedus*) is by some derived from faith (*fides*) and good faith ought to hold the chief place in it.
>
> We do not admit the more subtle discussions on fine points of law, which passing over the principles of right and justice, push the examination to the very quick. . . . All subtle legal exceptions should be set aside and that only should be said which becomes a sovereign.[1]

Grotius, dealing with promises, says that these are binding by the law of nature, although legal rights thereby can be gained only as a matter of positive law.[2] Richelieu, although fond of referring to the *droit des gens* when he felt it relevant[3] argued the case for *pacta sunt servanda* exclusively in moral and political terms:

> Les Rois doivent bien prendre garde aux traités qu'ils font: mais quand ils sont faits, ils doivent les observer avec religion. Je sais bien que beaucoup de politiques enseignent le contraire. Mais, sans considérer en ce lieu ce que la foi chrétienne nous peut fournir contre les maximes, je soutiens que, puisque la perte de l'honneur est plus que celle de la vie, un grand prince doit plutôt hasarder sa personne même que les intérêts de son Etat que de manquer à sa parole, qu'il ne peut violer sans perdre sa réputation et par conséquent la plus grande force des souverains.[4]

But the question whether the King was morally bound to ratify the treaty turned on the question whether his agent had power to bind him, and this was a question susceptible of legal analysis, or at least of juridical analogy. Contemporary legal texts are ambiguous as to whether the King's faith could be committed by a plenipotentiary armed with ostensibly unlimited full powers who nonetheless exceeded his instructions. Gentili says that Catholic kings have sometimes refused to abide by an agreement made by a son-in-law, although he had full authority to make it: 'But the king replied that restrictive instructions had been given to the son-in-law. That was wrong and unbecoming a prince, who should say: "I have spoken once for all." '[5] He goes on to attack the notion that treaties can be repudiated on the ground that instructions have been exceeded, though it is unclear if he is referring to secret or public instructions, and he fails to mention full powers and seems to be embarked merely upon anti-Catholic polemics.

[1] *De jure belli*, III. xiv.

[2] *De jure belli ac pacis*, II. xi. 3.

[3] e.g. in the French declaration of war against Spain in 1635.

[4] *Testament politique, . . . avec une introduction et des notes par Louis André et une préface ed Léon Noel* (1947), p. 355.

[5] Op. cit. III. xiv.

Grotius is more specific and deals with the question whether or not a treaty's validity is dependent upon conformity with instructions:

> But we may be obligated also by another if there is no doubt concerning the intent with which we chose him as our agent, whether specifically for the business in hand, or under a general appointment. In the case of a general authorization it can happen that our agent may obligate us by acting contrary to our desires as expressed to him alone. In such a case two acts of will must be distinguished, one by which we bind ourselves to ratify whatever our agent does in business of such a nature, and the other by which we bind him not to act except according to our directions, which are known to him but not to others.
>
> This distinction is to be noted with respect to those promises which are made on behalf of kings by ambassadors, by virtue of the power contained in their credentials, but which exceed their secret instructions.[1]

It is to be noticed that Grotius refers loosely to 'credentials' and does not discuss full powers. There is the same lack of clarity in Pufendorf's discussion of the point two generations later. Acknowledging that, when limits have been prescribed, an agent cannot bind the principal, he then distinguishes public from secret instructions, and concludes that the agent can commit the principal provided he keeps within the strict letter of the open instructions, even though he exceeds the secret instructions.[2]

Considering the long history of full powers and the well-established rule that they alone indicated an ambassador's authority to commit his sovereign, it is curious that Richelieu did not take his stand more firmly on the implied limitation in Brulart's powers, which would fully have justified him. The *plena potestas* in the Middle Ages was a document of great significance, issued to representatives of the cities and towns summoned to Parliament, and occupying an even more important role in canonical procedures, and especially in legatine missions. It seems to have derived from Roman practice, where the expression itself appears at least as early as the third century in connection with the proctor as an agent in court,[3] and it was commented upon by the glossators and Bartolus,[4] who refers to power being 'general' and 'free', and Baldus, who limited the agent's power by denying him the right to give away his principal's property or injure his interests.[5] Diplomatic full powers evolved out of the judicial *plena potestas* at least by 1200, and they embodied similar expressions which were similarly interpreted.[6] The main problem which full powers were

[1] Op. cit. II. xi. 12.

[2] *De jure naturae et gentium* III. ix. 2. Zouche merely refers without comment to Gentili and Grotius: Juris et judicii fecialis sive juris inter gentes explicatio. iv. 14 [18].

[3] Gaines Post, *Studies in Medieval Legal Thought. Public Law and the State, 1100–1322* (1964), p. 92; Justinian, *Codex*, 2, 12, 10; Vinogradoff, *Roman Law in Medieval Europe* (1909), p. 40; Wilks, *The Problem of Sovereignty in the later Middle Ages* (1964), p. 481.

[4] *Commentaria*, vii to C. 2, 12, 10.

[5] *Super toto codice*, to C. 2, 12, 10.

[6] Gaines Post, op. cit., p. 103.

devised to overcome was that of distance and time; and the empowering of a diplomat was done to obviate the long delays that would result from reference back. But this implied that an ambassador should act within the scope of his authority laid down in his instructions. There seems to have been little discussion in the Middle Ages of the problem that would arise if an ambassador exceeded his instructions, though fully empowered. There is evidence that instructions played an important role in enabling ambassadors to insist on reference back when taken by surprise, and the conclusion has been drawn that '*plena potestas* gave the agent *carte blanche*, within the limits set by the principal's welfare and knowledge of the issue, to conclude the business'.[1] There would seem to have been a good deal of uncertainty about the matter as late as 1630, and this may be demonstrated by the sequel.

V. The Sequel

It is likely that Richelieu consulted *De jure belli ac pacis* when deciding how firm was the ground on which he stood in the tense diplomatic situation that developed after the refusal to ratify the Treaty of Regensburg. There is no evidence that he did; on the other hand, he was always legalistic in his approach and thoroughly researched the literature bearing on any problem, and he was acquainted with both Grotius and his work. It is interesting, therefore, to know what view Grotius took of the matter, and of this we have an indication from his own pen. It so happened that Grotius was sent by the Swedish chancellor Oxenstierna to Paris in March 1635 primarily to defend Oxenstierna's refusal to ratify a treaty[2] signed the previous November by Löffler and Streiff von Lauenstein, the Swedish and German Protestant plenipotentiaries, and to secure a new treaty from the French on better terms. The treaty signed by Löffler and Streiff was objectionable to the Swedes in several respects, but mainly in that it gave France supreme direction of the allied forces in the Thirty Years War. Whether Löffler and Streiff had exhibited full powers is not known, but the treaty which they signed recited Oxenstierna's full powers from the Swedish regency,[3] and it could be argued that the two envoys were merely sub-delegates of a complete authority.

Grotius was by no means welcome[4] and he had no little difficulty in presenting his credentials to Louis XIII, who delivered him a sharp lecture on religious liberty.[5] On 14 March 1635 Claude Bouthillier, whose son had meanwhile succeeded him as Secretary of State, asked Grotius to meet

[1] Gaines Post, op. cit., p. 107.

[2] Dumont, op. cit., vol. 6. 78.

[3] Art. I described Oxenstierna as 'intervenant en ce Traité au nom et avec Plein-Pouvoir de ladite Couronne'.

[4] 'L'on ne traitera point ici avec le sr. Grotius et il sera promptement renvoyé après sa première audience.' Fagniez, op. cit., vol. 2, p. 193.

[5] Ibid., p. 194.

him and Père Joseph at the convent of the Capuchins, where Père Joseph was recuperating from a sickness. Grotius decided that this would not reflect on his dignity as an ambassador and agreed. He found Bouthillier and Père Joseph in the gardens of the Tuileries, which adjoined the convent. According to Grotius's report of the conversation to Oxenstierna,[1] the question of the validity of the November treaty was quickly raised. Père Joseph argued that since Löffler and Streiff had engaged the Swedish Crown without reservation, the latter was bound even though it had not ratified, and he reinforced his argument by reference to the recitation of what he described as the 'full powers of Löffler and Streiff' in the preamble. Grotius replied that Sweden did not contest the validity of the treaty in respect of those confederates which had ratified it, and would be prepared to conform with it to the extent that it did not prejudice Sweden's interests. Apparently Père Joseph at this point contended that this was impossible, for a commitment had been made and was binding. Grotius, with perhaps a touch of malice, then reminded Père Joseph that he had signed the Treaty of Regensburg but that this had not prevented the King from refusing ratification, and he sought to draw an analogy between the two cases. The analogy was vigorously contested by Père Joseph, who argued that he and Brulart, before signing the Treaty of Regensburg, had been careful to declare that several of its provisions exceeded their powers; and he could produce evidence of this. 'But we did too,' exclaimed Grotius, 'for in Germany everyone understands the treaty as I do.' The conversation then became acrimonious and ended with Grotius and Père Joseph in a state of mutual hostility. A week later Richelieu saw Grotius, where there was a repetition of the scene,[2] and then Oxenstierna himself came to

[1] Letter of 5/15 March 1635, Hugonis Grotii, *Epistolae Quotquot reperiri potuerunt* (Amsterdam, 1687), p. 135: 'Heri misit ad me pater Butillerius, velle se ad me venire cum patre Iosepho Cappucino, cujus maxima nunc est apud Cardinalem auctoritas, & qui ob summam versutiam ab ipso Cardinali, siquidipsi evenerit humanitus successor destinari solet. Verum cum vapide se haberet monachus, rogare se ad monasterium ut venirem, annui: nam & Cardinalis non ita pridem inviserat aegrotantem. Eo cum venissem ad proximos monasterio hortos deductus regios, ibi & Butillerium reperi & Iosephum. Post ea unde auspicari sermones mos est ad res praecipuas ubi delapsi sumus, urgere Iosephus pactorum Parisiensium Scripturam manifeste ostendere ex vi potestatis plene initum contractum, sine conditione approbationis. Dixi me contrarium intellexisse non ex Illust. Excell. Vestra sola, sed ex aliis quoque: neque id unquam negasse D. Feuquerium, idem sensisse civitates, quae ne nunc quidem ea probassent: quanquam Germaniae quatuor Circulos quod attineret, Illustriss. Excell. Vestram habere ea pro probatis, ob majoris partis sententias, ac proinde in directione ea secuturam quatenus res Suedica iis non laederetur. Addidi exemplum Ratisbonensium pactorum, quae signasset ipse Iosephus, Rex habuisset irrita. Dicebat antequam signarent palam professos se & Leonium quarundam partium se non habere potestatem. Ejus rei se habere testes. Respondi igitur & nobis, si id negarent quod in Germania negasset nemo, quaerendas probationes.'

[2] Letter of 19/28 March 1635, ibid., p. 139: 'Ubi eo ventum est pauca cum Patre Iosepho collocutus, qui ob id eo vocatus fuerat, Cardinalem qui se in reditum hunc suum in urbem distulisse colloquia mecum dicebat, nomine Reginae Rectorumque Sueciae, ac Ill. Exc. Vestrae salutavi, in amicitia & officiis benevolis ut perstaret rogavi, & literas illas mihi commendatas tradidi. De negotio mihi commisso agere statim caepit, & adhibito ad sermonem Iosepho urgere

France and negotiated a new treaty.[1] Ratification of this was also refused by Sweden.

There was thus a catalogue of diplomatic controversies concerning failure to ratify, which must have made all the chancelleries of Europe aware of the care that should be taken with instructions and full powers. There is, in addition to the instances mentioned, another related instance in which it is clear that the imperial authorities acted respecting full powers with deliberate deviousness. During the Regensburg negotiations the question arose whether negotiations for peace on the field in Italy were being superseded. Collalto protested that they were because he had been told by the imperial authorities that Brulart had full powers. We know that Brulart had told these authorities that he had full powers, but Richelieu denied this to Collalto, saying in his report of the matter to Brulart that this 'was true'.[2] But did Collalto have full powers? We know that he had, and Brulart was told in Regensburg that he had,[3] but Collalto told the French generals in the field that he did not have them.

When, therefore, the delegates reached Münster in 1644, after several attempts to call a peace conference had proved abortive, they did so with the caution induced by experience, and with much clearer ideas of the issues raised by full powers and the relationship they bore to instructions than their predecessors had had. Out of this caution was born the modern international law of ratification.

Pacta Parisientia persecta sine ulla conditione. . . . . Adjiciebat monachus edoctum Regem me horum consiliorum Ill. Exc. Vestrae fuisse auctorem, & spem fecisse me per amicos multa Pactis Parisiensibus meliora impetraturum. Dixi confictum hoc ut multa antehac contra Ill Exc. Vestram, praecipue questus de atrocitate calumniae super aversis alio pecuniis. Dixit deinde Cardinalis videre se inter me & Iosephum minus convenire. Velle se esse conciliatorem mutuae inter nos benevolentiae.'

[1] Dumont, op. cit., vol. 6, p. 88.

[2] Avenel, op. cit., vol. 3, p. 897.

[3] Ibid., p. 897, n. 1.

BUDGET APPROVAL BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS: DUTY OR DISCRETION?*

By THEODOR MERON[1]

Legal Adviser of the Israel Ministry for Foreign Affairs

Introduction

THE object of the present article is to consider whether the General Assembly of the United Nations has a legal duty to approve the regular budget for the other principal organs of the United Nations Organization; i.e. whether the approval of the regular budget for the other principal organs is a discretionary, or a ministerial, act. This question turns upon the interpretation and the application of Article 17 (1) of the Charter of the United Nations, which provides that 'the General Assembly shall consider and approve the budget of the Organization'. It will also be necessary to consider the budgetary practices of the United Nations. It is not proposed to examine, except incidentally, the question of the approval of the budget estimates of various subsidiary bodies. The *sui generis* case of the approval of the necessary estimates for the payment of the awards of a *judicial* organ established by the General Assembly was considered by the International Court of Justice in its Advisory Opinion on the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (1954).[2] This question also is not, as such, within the scope of the present paper. However, the records of the debate which took place in the General Assembly and which resulted in the decision to request from the Court an Advisory Opinion, as well as the written and oral statements before the Court, throw an important light on the views of various Governments on the budgetary powers of the General Assembly with regard to other principal organs of the United Nations, and therefore touch closely on the subject here discussed.

Only the regular budget of the United Nations will be considered; in consequence the paper does not deal with the special accounts for peace-keeping operations in the Congo and in the Middle East—about which so much has already been written—or with the continuing controversy

* © T. Meron, 1968.

[1] M.J. (Hebrew University, Jerusalem), LL.M., S.J.D. (Harvard). Former Humanitarian Trust Student in Public International Law at the University of Cambridge. The representative of Israel in the Fifth (Administrative and Budgetary) Committee of the United Nations and Counsellor in the Permanent Mission of Israel to the United Nations 1963–1966. The views expressed in this article are those of the writer and do not necessarily reflect the opinion of the Israel Ministry for Foreign Affairs.

[2] *I.C.J. Reports*, 1954, p. 47.

regarding the competence of the Security Council and of the General Assembly, respectively, in the field of peace-keeping, and in the various technical assistance and economic, social and humanitarian programmes financed on a voluntary basis. Nor will the question of the *contents* of the regular budget, i.e. the question of what may or may not be legally included in it, be considered in any detail. For the purposes of this paper the working assumption will be that the various programmes and operations financed under the regular budget are legally included in it.

The problem of the budgetary powers of the General Assembly can be considered either as a problem of inter-organ administrative, budgetary and political co-ordination, and thus as basically a problem of International Organization;[1] or it can be considered as a legal and constitutional problem. It is the latter method that will be followed in the present paper.

Travaux Préparatoires *of Article* 17 (1) *of the Charter*

It will be useful first to examine the genesis of Article 17 (1) of the Charter providing for budgetary powers of the General Assembly. It will also be useful to consider how far this evidence suggests that it was intended to impose any limitations on the exercise of discretion by the General Assembly in making budgetary provision for the other principal organs of the Organization.

It may be recalled that the Covenant of the League of Nations as first adopted did not expressly assign the power of approval of the budget and apportionment of expenses either to the Council or to the Assembly of the League. The last paragraph of Article 6 of the Covenant provided that 'the expenses of the Secretariat shall be borne by the Members of the League in accordance with the apportionment of the expenses of the International Bureau of the Universal Postal Union'.[2] The rules of procedure of both the Council and the Assembly were based on the assumption that each of these two organs had a financial role.[3]

Accordingly, budget estimates were prepared by the Secretariat and

[1] Such an approach was followed by this writer in his paper on 'Administrative and Budgetary Co-ordination by the General Assembly' in *U.N. Administration of Economic and Social Programmes* (ed. by Mangone, 1966), pp. 37–101.

[2] *British and Foreign State Papers*, vol. 112, p. 13.

[3] See Rules of Procedure of the Assembly of the League adopted on 6 January 1921, Rule 4 (2) (*f*), *League of Nations*, *Assembly Documents*, Doc. No. 20/48/143. See further Rules of Procedure of the Council of the League of Nations, resolved on 17 May 1920, Arts. 11 and 12. Art. 11 provided for the submission of the draft budget by the Secretary-General to the Council for approval. After its approval by the Council, the budget was to be submitted for final approval to the Assembly. When it was impossible to obtain in time the final approval of the budget by the Assembly, the Council could declare the budget it had passed as 'applicable and effective... pending approval by the Assembly'. Art. 12 dealt with the examination of accounts; *League of Nations Official Journal* (1920), p. 274.

submitted first to the Council and then to the Assembly for final decision. However, the concurrent authority of the two organs was not long-lived. On 13 August 1924, Article 6 (5) of the Covenant was amended to read: 'The expenses of the League shall be borne by the Members of the League in the proportion decided by the Assembly.'[1]

Many early drafts of constitutional instruments for a new international organization were made during the Second World War in the United States of America, and the genesis of Article 17 of the Charter can be traced back to the so-called 'Draft Constitution' of 14 July 1943 prepared by a Special Sub-Committee on International Organization of an Advisory Committee appointed by the Secretary of State. Article 5 (5) of this document gave the General Conference and the Council (which was to be a general executive organ of limited membership) concurrent control over the budget. It provided that the 'budgetary estimates of the International Organization and its constituent bodies shall be subject to examination and approval by the General Conference and by the Council, which shall determine the method by which the necessary funds shall be provided and properly allocated among the Members'.[2]

This approach, however, was modified shortly afterwards by the Research Staff of the Department of State, in the 'Charter of the United Nations'—the so-called 'Staff Charter'—dated 14 August 1943.[3] Article 3, paragraph 3, of this draft provided that 'the General Conference shall review the work of the organs of the United Nations, [and] shall vote

[1] See Protocol of an Amendment to Art. 6 of the Covenant, Annex 3, *League of Nations Official Journal* (January 1922), p. 11. The contents of the relevant rule of procedure of the Assembly were not changed after the amendment's entry into force. See Rule 4 (2) (*e*). Rules of Procedure of the Assembly of the League, 15 November 1934, Doc. C. 472. M. 204. 1934. V But Art. XI of the Rules of Procedure of the Council was later deleted. See Rules of Procedure of the Council, adopted on 26 May 1933, Doc. C. 197. M. 106. 1938. It is, however, interesting to observe that under Art. XII of these rules the President of the Council still could, under certain circumstances, take financial measures 'of an urgent character which fall within the competence of the Council, such as the approval of transfers', charging the unforeseen expenses and advances to the Working Capital Fund.

Singer, in *Financing International Organization, the United Nations Budget Process* (1960), p. 2, speaking about the Covenant before the relevant amendment had been made observes that 'it had been this very dispersal of authority which led to some of the greatest difficulties in the League's finances. The Covenant had failed to specify 'what organ of the League shall determine the budget and approve the accounts' and it was not until 1930 that the struggle for budgetary power ended in an Assembly victory, with the end of the Council's domination of the Supervisory Commission, and delegation of appointive power to that body assigned to the Assembly's Fourth (Financial and Budgetary) Committee.'

[2] Text in the Department of State's *Postwar Foreign Policy Preparation, 1939–1945*, Publication 3580 (1950), p. 472, at p. 475. (Hereinafter referred to as *Postwar Foreign Policy Preparation.*) Russell, in *A History of the United Nations Charter, the Role of the United States 1940–1945* (1958), observes that these budgetary provisions, which were 'included practically without discussion', were 'in line with the secondary position given the Conference in other areas'. (p. 377). Singer, referring to the experience of the League of Nations, observes that this draft was 'one of the more glaring examples of inability to learn from experience'; op. cit., p. 2.

[3] Text in *Postwar Foreign Policy Preparation*, p. 526.

the appropriations for their activities . . .';[1] but, under Article 13, paragraph 1, of the Staff Charter, the basis of apportionment of the expenses of the Organization among its members was to be 'determined by the General Conference with the approval of the Council', because 'the major powers would have to make the greatest contributions and should therefore have a larger voice in the allocations'.[2]

The 'Plan for the establishment of an International Organization for the Maintenance of International Peace and Security'—the so-called 'Outline Plan'—of 23 December 1943[3] provided in Article IV (8) that 'all administrative and budgetary arrangements should require approval of the General Assembly . . .'; and the idea that the power of the purse belongs to the General Assembly as the plenary organ was also accepted by the United States in the 'Tentative Proposals for a General International Organization' of 18 July 1944,[4] prepared by the Informal Political Agenda Group. Article II B.2 (*f*) granted exclusively to the General Assembly the power 'to approve the budget of the organs and agencies of the organization, to determine a provisional and a continuing basis of apportionment of expenses of the organization among the member states together with the procedure of apportionment . . .'.[5] It was provided, however, that in voting on these matters 'each member State should have voting power in proportion to its contribution to the expenses of the organization'.[6] This weighted voting procedure was a result of the debate which had taken place in the informal Political Agenda Group as to whether the Assembly's control of the budget

> . . . might enable it to control decisions of the Executive Council. It was suggested that either direct or concurrent control by the Council of its own budget might be allowed. On the other hand, it was pointed out that the Executive Council would draw its funds from the total resources of the organization contributed by all member States, and they should therefore be entitled to decide the budgets of all organs through the General Assembly. To be on the safe side, however, voting power on all budgetary and allocation questions was made proportionate to the financial contribution of each member State.[7]

[1] Text in *Postwar Foreign Policy Preparation*, p. 527. Russell observes that the Staff Charter returned to the system of having the Conference alone vote the budgets 'on the ground that all members had to share the obligation and should therefore share the decisions'; op. cit., p. 377. Through its budgetary power, the Conference 'could lay down broad directives for the technical organizations. Policy could thus be made in the light of important political considerations, and kept consistent with the principles of the entire organization. Priorities could be established and the various programmes effectively correlated'; ibid., p. 312.

[2] Russell, op. cit., p. 377.

[3] Text in *Postwar Foreign Policy Preparation*, p. 577. Under the Outline Plan, the Council had no budgetary role. See also Singer, op. cit., p. 3, and Russell, op. cit., p. 360.

[4] Text in *Postwar Foreign Policy Preparation*, p. 595.

[5] Ibid. 597.

[6] Art. II C. 3.

[7] Russell, op. cit., p. 378.

The Dumbarton Oaks Proposals published on 7 October 1944[1] following extensive four-power conversations, provided in Chapter V, Section B (5) that the 'General Assembly should apportion the expenses among the members of the Organization and should be empowered to approve the budgets of the Organization'. Decisions on budgetary questions, as decisions on other important questions, were to be made by a two-thirds majority of those present and voting.[2]

At the San Francisco Conference, Chapter V, Section B, paragraph 5, of the Dumbarton Oaks Proposals was referred for consideration to Committee II/1 (General Assembly/Structure and Procedure). This Committee was principally concerned with working out an equitable basis of apportionment of the expenses of the United Nations among the member States and the procedure by which the General Assembly should prepare and approve the budget of the Organization. The text was subsequently considered by Committee II/1 Sub-Committee A (Drafting Sub-Committee) which on 19 May 1945 adopted, without comment or discussion, the following text: '. . . The budgets of the Organization shall be submitted to the General Assembly for consideration and approval.'[3] This phrase appeared unchanged in the report of the Sub-Committee of 25 May;[4] but the Second Report of the Sub-Committee, dated 26 May, contained a modified version and the phrase then read: 'It [the General Assembly] shall consider and approve the budgets of the Organization. . . .'[5] This latter text was considered by Committee II/1 on 26 May and approved without change.[6]

On 23 May, following the instructions of the Co-ordination Committee, the Secretariat submitted an Arrangement of the Charter in which the provision concerning the budgetary powers of the General Assembly became Article 13.[7] The text of Article 13 was reproduced in the Skeleton Charter submitted by the Secretariat on 29 May to serve as a guide to the Co-ordination Committee and as a working document for the Advisory Committee of Jurists.[8] At the eighth meeting of the Co-ordination

[1] Department of State, *Dumbarton Oaks Documents on International Organization*, Publication 2257 (1945), pp. 5–16.

[2] Russell observes that all four Governments (British, American, Soviet and Chinese) agreed in their pre-conference recommendations that the Assembly, as the plenary organ, should control the budget. The United States did not press its suggestion for weighted voting in financial matters; op. cit., pp. 425–6

[3] *United Nations Conference on International Organization* (hereinafter referred to as *U.N.C.I.O.*), vol. 8, p. 534. See also the *Note on the Records of the United Nations Conference on International Organization, San Francisco, 1945, relating to the drafting and adoption of Article 17, paragraph 2, of the Charter*, prepared by the Secretary-General of the United Nations and contained as Document 194 in the Dossier transmitted by him to the International Court of Justice in connection with the Advisory Opinion regarding *Certain Expenses of the United Nations* (*Article 17, paragraph 2, of the Charter*).

[4] *U.N.C.I.O.*, vol. 8, p. 541. The word 'General' was, however, omitted.

[5] Ibid., p. 549. [6] Ibid., p. 418. [7] Ibid., vol. 17, p. 476. [8] Ibid., p. 486.

Committee, on 30 May, the Secretary proposed to withdraw the revised text of Article 13 and to substitute a new draft which in the relevant part read as follows: 'The General Assembly shall approve the budget of the Organization. . . .'[1] The following discussion then ensued:

> Mr. Hasluck raised the question whether there was to be one budget or two. Mr. de Freitas Valle pointed out that the World Court might require a separate budget. Messrs. Pelt and Hasluck stated that the practice of the League had been to have a single budget made up of different sections, and a single scale of apportionment which could be applied whether or not a state was a member of both the League and the World Court.
>
> Mr. Niete del Rio moved the re-insertion of the words 'consider and' before the word 'approve' as in the text approved by the Technical Committee. This was agreed to.[1]

It thus appears that the words 'consider and' were put back into the text, unfortunately without a discussion which might have thrown more light on them, and they were not subsequently deleted. It is interesting to observe that the possibility of having a separate budget for the Court was considered and rejected.

The word 'consider' which did not appear in the Dumbarton Oaks Proposals is, of course, of major importance. Later, in the hearings on the Advisory Opinion regarding the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, the Government of the United States of America was to base on this word its argument that the act of budget approval is discretionary, and not merely ministerial, even when providing for the awards made by the Tribunal.[2] That Government argued further:

> To conclude that the General Assembly has no legal alternative to adopting the decision of the Administrative Tribunal or paying the award the Tribunal may have made, is to diminish the power and function of the Assembly to the vanishing point of a mere ministerial act. Article 17, on the contrary, requires, not only that the General Assembly shall 'approve' the budget, but that it shall 'consider' it. Such language negates any notion that appropriating money may be merely a ministerial job. The existence of a power to limit the amount of awards in advance, and failure to have exercised this power prior to the Eighth General Assembly, could not constitute thorough and adequate 'consideration', in the sense of Article 17, of all future budgetary implications of the Statute of the Administrative Tribunal.[3]

The text, including the word 'consider', became part of Article 17 in the Draft Charter issued on 15 June.[4] After discussion in the Co-ordination Committee, Article 17 was referred to Committee II/1 which approved, on 18 June, the text presented by the Co-ordination Committee. It is of interest to note that in the revised report dated 24 June, the Rapporteur of

[1] *U.N.C.I.O.*, vol. 17, p. 40.
[2] *I.C.J. Pleadings*, 1954, p. 138.
[3] Ibid.
[4] *U.N.C.I.O.*, vol. 18, p. 391.

Commission II stated that 'the Assembly will have authority in financial and budgetary matters . . .'.[1]

On 20 June the Co-ordination Committee decided to rephrase Article 17 so as to place the budget first, the apportionment second and the financial arrangements with the Specialized Agencies third. Article 17, paragraph 1, thus obtained its final form[2] and its text was approved at the ninth plenary meeting on 25 June 1945,[3] to read: '1. The General Assembly shall consider and approve the budget of the Organization.'

The preceding examination of the genesis of Article 17 (1) of the Charter shows that the General Assembly was intended to have the power of the purse and to provide for all the organs of the Organization. This power was to be exclusive and not concurrent. Article 17 (1) imposed no limits on the discretionary powers of the General Assembly with respect to the consideration and the approval of the budget.[4] It does not necessarily follow, however, that such limitations do not flow from other provisions of the Charter, and, indeed, the Charter as a whole.

The Advisory Opinion of 20 July 1962 regarding Certain Expenses of the United Nations

In *Certain Expenses of the United Nations* (*Article 17, paragraph 2, of the Charter*)[5] the International Court of Justice considered and interpreted Article 17 (2) of the Charter which provides: '2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.' The pleadings of the various governments in this case throw some light on Article 17 (1). The Court too, in its Advisory Opinion, made certain general observations on Article 17 (1); and although these comments deal primarily with the question of the contents of the budget, they also allude to the budgetary powers of the General Assembly.

With regard to an argument that the adjective 'administrative' was to be understood as qualifying the word 'budget', the Court said:

> In the first place, concerning the word 'budget' in paragraph 1 of Article 17, it is clear that the existence of the distinction between 'administrative budgets' and 'operational budgets' was not absent from the minds of the drafters of the Charter, nor from the consciousness of the Organization even in the early days of its history.[6]

[1] Ibid., vol. 8, p. 266.

[2] Ibid., vol. 17, p. 322.

[3] Ibid., vol. 1, pp. 612 et seq.

[4] Goodrich and Hambro observe, with respect to Art. 17 (1), that it gave the General Assembly 'the important power of considering and approving the budget of the United Nations. . . .The power to approve the budget carries with it, of course, the important power of reviewing the work of the Organization and of controlling its activities'; *Charter of the United Nations, Commentary and Documents* (2nd ed., 1949), p. 183.

[5] Advisory Opinion of 20 July 1962, *I.C.J. Reports*, 1962, p. 151.

[6] Ibid., p. 159.

The Court then said that the Charter refers to the 'administrative budgets' of the Specialized Agencies in Article 17 (3), and added:

If it had been intended that paragraph 1 should be limited to the administrative budget of the United Nations Organization itself, the word 'administrative' would have been inserted in paragraph 1 as it was in paragraph 3. Moreover, had it been contemplated that the Organization would also have had another budget, different from the one which was to be approved by the General Assembly, the Charter would have included some reference to such other budget and to the organ which was to approve it.[1]

The Court also said that 'Article 17 is the only Article in the Charter which refers to budgetary authority, or to the power to apportion expenses, or otherwise to raise revenue, except for Articles 33 and 35, paragraph 3, of the Statute of the Court . . .'.[2] And went on to say:

By Article 17, paragraph 1, the General Assembly is given the power not only to 'consider' the budget of the Organization, but also to 'approve' it. The decision to 'approve' the budget has a close connection with paragraph 2 of Article 17, since thereunder the General Assembly is also given the power to apportion the expenses . . . When those expenses include expenditures for the maintenance of peace and security, which are not otherwise provided for, it is the General Assembly which has the authority to apportion the latter amounts among the Members. The provisions of the Charter which distribute functions and powers to the Security Council and to the General Assembly give no support to the view that such distribution excludes from the powers of the General Assembly the power to provide for the financing of measures designed to maintain peace and security.[3]

Despite these views of the Court regarding the items which may be legally included in the budget or considered as legitimate expenses of the Organization, and its conclusion by a majority vote, that certain expenditures authorized by the General Assembly for O.N.U.C. and U.N.E.F. were expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter, the controversy continues not only as regards O.N.U.C. and U.N.E.F. but also on the general question of the legality of the inclusion of certain items in the regular budget.[4]

[1] *I.C.J. Reports*, 1962. Referring to Chapters IX and X of the Charter, and especially to those articles which specify the functions and powers of the Economic and Social Council, the Court similarly said that the Charter 'anticipated the numerous and varied circumstances under which expenses of the Organization could be incurred'. Again, referring to Art. 98 of the Charter under which the Secretary-General has to perform such functions as are entrusted to him by the General Assembly, the Security Council, the Economic and Social Council and the Trusteeship Council, the Court concluded that 'whether or not expenses incurred in his discharge of this obligation become 'expenses of the Organization' cannot depend on whether they be administrative or some other kind of expenses'; ibid., pp. 161–2.

[2] Ibid., p. 162.

[3] Ibid., p. 164.

[4] The following passages from the *Report of the Fifth (Administrative and Budgetary) Committee of the General Assembly on the Budget Estimates for the Financial Year 1967*, dated 19 December 1966, A/6631, pp. 14–15, summarize the debate in this Committee during the Twenty-first Session of the General Assembly:

38. As in the past, a number of delegations objected to the inclusion in the budget estimates of provisions for certain activities which in their view had been taken in contravention of the

Rules of Procedure, Financial Rules and Regulations and the Practice of the Organization

The Financial Rules and Regulations of the United Nations and the Rules of Procedure of the various principal organs are indicative of the practice of the Organization,[1] and are of value for the interpretation of the provisions of the Charter by the organs charged with their implementation;[2] though obviously the Rules of Procedure of the Organs of the Organization are subordinate to the Charter.[3]

In order to provide a measure of control over the decisions taken by the Councils and by its main and other committees the General Assembly adopted, upon the recommendation of the Advisory Committee on Administrative and Budgetary Questions (hereinafter called 'Advisory Committee'), the Financial Regulations now numbered 13. 1 and 13. 2, concerning resolutions involving expenditures. These Regulations provide as follows:

13. 1: No council, commission or other competent body shall take a decision involving expenditure unless it has before it a report from the Secretary-General on the administrative and financial implications of the proposal.

13. 2: Where, in the opinion of the Secretary-General, the proposed expenditure cannot be made from existing appropriations, it shall not be incurred until the General Assembly has made the necessary appropriations, unless the Secretary-General certifies that provision can be made under the conditions of the resolution of the General Assembly relating to unforeseen and extraordinary expenses.[4]

Financial Regulations 13. 1 and 13. 2 are indicative of the will of the General Assembly to exert its control over budgetary appropriations; but

Charter and to which they were consequently unable to contribute. The items in question were those relating to the United Nations Memorial Cemetery in Korea, the United Nations Commission for the Unification and Rehabilitation of Korea (UNCURK), the United Nations Truce Supervision Organization in Palestine (UNTSO), the United Nations Field Service and the United Nations Bond Issue.

39. A number of these delegations also considered that the provisions under part V relating to technical assistance had no place in the regular budget, which should be confined to administrative expenses. . . . On the other hand, the view was expressed that technical assistance should not only be retained as one of the major elements of the budget but that its scope should be broadened . . .

41. On the subject of the bond issue and other controversial items, the point was made that if the regular budget could be brought back into balance by removing the disputed sections, it would be possible to transform the budget into a genuinely administrative one which would be beyond the reach of political controversy.

[1] See Lauterpacht, *The Development of International Law by the International Court* (1958), p. 171. See, in general, the *Repertory of Practice of United Nations Organs*, vol. 1, pp. 515–29, and Supplement No. 2, vol. 2, pp. 161–73.

[2] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, *I.C.J. Reports*, 1950, p. 4 at p. 9. See also, generally, Tammes, 'Decisions of International Organs as a Source of International Law', *Recueil des cours* 94 (1958–II), p. 548.

[3] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, Advisory Opinion of 7 June 1955, *I.C.J. Reports*, 1955, p. 67 at pp. 76–7.

[4] ST/SGB/Financial Rules/1. 1960.

although binding on the Secretariat, the Regulations are no more than recommendations *vis-à-vis* the other principal organs. Moreover, all that Regulation 13. 1 provides for is the submission of reports by the Secretary-General on the financial implications of the proposals to be voted upon in a given Council. Although Regulation 13. 2 stipulates that expenditures 'shall not be incurred until the General Assembly has made the necessary appropriations', it does not, of course, preclude the adoption of resolutions under which new programmes or studies are decided upon. Such programmes or studies may indeed be initiated, and may bind the hands of the General Assembly, leaving it no choice but to approve the necessary appropriations. Moreover, considerable budgetary latitude is provided by Regulation 13. 2 as regards expenditure authorized under the annual resolution on unforeseen and extraordinary expenses.

The Economic and Social Council and the Trusteeship Council, but not the Security Council,[1] have in their own rules of procedure provisions concerning the financial implications of their decisions, presumably promulgated in order to give effect to Financial Regulation 13. 1. Rule 34 of the Economic and Social Council provides, *inter alia*:

> 2. Before a proposal which involves expenditure from United Nations funds is approved by the Council or by any of its committees, the Secretary-General shall prepare and circulate to members . . . a separate estimate of the cost involved in each such proposal . . .
>
> 3. The Council shall take into account the estimates referred to in paragraph 2 before adopting any proposal involving expenditure from United Nations funds. If the proposal is adopted, the Council shall indicate, whenever appropriate, the priority or degree of urgency which it attaches to the projects . . .
>
> 4. Whenever the Council wishes to recommend, in cases of exceptional urgency, that work for which no financial provision exists be started before the next regular session of the General Assembly, it shall include a specific indication to that effect to the Secretary-General in the resolution approving the proposal.[2]

Thus Rule 34 does not preclude the adoption of decisions entailing expenditures not provided for in the budget adopted by the General Assembly.

[1] Regarding expenses arising from decisions of the Security Council, see G.A. Resolution 2243 (XX), discussed below, and Financial Rule 103. 6. The annual budget of the United Nations provides, of course, for the anticipated programme of work of the Security Council. See the Note by the Controller on the *Budgetary and Financial Practices of the United Nations*, ST/ADM/L. 4, para. 29, for a list of instances in which the Council considered the financial aspects of certain cases. As the controversy over the competing jurisdictions of the General Assembly and the Security Council continues, the expenses occasioned by decisions of the Economic and Social Council and its subsidiary bodies constantly grow.

[2] E/3063, March 1958. Rule 65 of the Rules of Procedure of the Trusteeship Council, T/1/Rev. 6 (1962), provides:

> No resolution involving expenditure from United Nations funds shall be approved by the Trusteeship Council unless the Trusteeship Council has before it a report from the Secretary-General on the financial implications of the proposal, together with an estimate of the costs involved in the specific proposal.

In his recent note on the Budgetary and Financial Practices of the United Nations[1] the Controller of the United Nations said that 'in accordance with financial Regulation 13. 2, no expenses arising out of decisions have been incurred unless authorized by the General Assembly or by the Secretary-General under the authority granted to him by the annual resolution on unforeseen and extraordinary expenses'. But if resolutions initiating new programmes *are* adopted, the General Assembly may not be able later freely to 'consider' the necessary appropriations and may feel obliged to approve them. It is, moreover, clear that neither the Economic and Social Council by Rule 34 of its Rules of Procedure, nor the Trusteeship Council by Rule 65 of its Rules of Procedure, have imposed real limitations on their freedom of action. It is not surprising, therefore, that the Financial Regulations and the above Rules of Procedure have not achieved their basic objective.

The constitutional problem is not new; it arises from the authority of the Councils to take decisions on certain matters, even if those decisions necessitate budgetary appropriations. As early as October 1946,[2] the Advisory Group of Experts on Administrative, Personnel and Budgetary Questions, observed in its Second Report that under 'the General Provisions of the Charter of the United Nations and of certain specific decisions of the General Assembly, the various Councils, Commissions and Committees are given powers to undertake investigations, surveys and studies. As a result, these bodies take decisions . . . which have important budgetary consequences.' The Committee observed that there was a lack of specific budgetary limitations on the activities of the various organs and that it would be desirable 'that systems should be devised to enable priorities to be established with due regard for budgetary implications'.[3] Similarly, the Advisory Committee noted in its Report on the Budget Estimates of the United Nations for 1948,[4] that the

> . . . Secretariat is obviously placed in an intolerable position if administrative and budgetary committees call it to task over increasing expenditures while other committees can increase the work load with little or no restraint. The Committee has no doubt that a great weakness in the United Nations financial system is the fact that projects can be approved by bodies other than the General Assembly, which is the only appropriating authority.[5]

An important attempt to secure the necessary co-ordination between the General Assembly as the appropriating organ of the Organization on the one hand, and the three Councils on the other, was made by Belgium as

[1] ST/ADM/L. 4, para. 26.
[2] A/C. 5/42, October 1946, para. 56.
[3] Ibid.
[4] A/336, 8 August 1947, *G.A.O.R.*, Second Session, Supplement No. 7.
[5] Ibid., para. 26.

early as the Second Session of the General Assembly. A Belgian draft resolution presented to the Fifth Committee[1] noted that under the Charter the three Councils could make in their respective provinces decisions on activities involving expenditure for which the necessary credits had not previously been voted by the General Assembly and that the General Assembly could not thus exercise freely the powers conferred upon it under Article 17 (1) of the Charter. It proposed, therefore, the establishment of a permanent work-planning committee of the United Nations, composed of representatives of the General Assembly appointed on the recommendation of the Fifth Committee, and of representatives of the three Councils. The task of this committee would have been to prepare, with the assistance of the Advisory Committee and of the Secretary-General, a plan of work of the Organization and to establish an order of priorities. Before taking any decision involving expenditure for which no credit had been provided each Council would have been required to consult the committee, which could then recommend to the Secretary-General and the Advisory Committee that the necessary advances be made from the Working Capital Fund. In view of the opposition it raised this Belgian proposal was not pursued.

The General Assembly has attempted by various exhortatory resolutions to appeal to the Councils not to take decisions involving expenditure without prior budgetary appropriation by the General Assembly, but these exhortations have not been heeded. Before the adoption of one such resolution, Resolution 1797 (XVII) of 11 December 1962, one delegate expressed the following sceptical view in the Fifth Committee of the General Assembly:

> Before the situation could be remedied, however, it must be properly defined. The situation was, in fact, simple: United Nations bodies could take decisions on matters within their competence which bound the hands of the Fifth Committee when it came to consider the impact of those decisions on the budget of the Organization. The Fifth Committee, which was responsible for keeping the Organization's finances on a sound footing, could neither originate decisions in other bodies nor change the substance of their decisions once they had been made. It was constantly being faced with a fait accompli and was now very understandably suffering from a sense of frustration at its inability to discharge its vital responsibilities.
>
> The draft resolution was not intended as more than a first step towards remedying that situation. . . . It did not do more than call upon the Economic and Social Council to exercise restraint in taking decisions which had financial implications. It did not provide for any effective action, if the Council chose to disregard that admonition . . . some way of enforcing it should be envisaged; a ceiling might, for instance, be imposed on expenditure on economic and social activities.[2]

[1] A/C. 5/179, 24 October 1947.

[2] Statement by Mr. Liveran, representative of Israel, *G.A.O.R.*, Seventeenth Session, 949th Meeting of the Fifth Committee 15 November 1962, paras. 6–7.

There are several reasons for the failure of the exhortatory resolutions. One reason is to be found in the constitutional problem of competence; another in the lack of co-ordination on the national level, i.e. between representatives of the same country in the various organs of the United Nations, and in a broader sense in the failure of inter-organ co-ordination. These difficulties are compounded by the ineffective budgetary procedures of the General Assembly. During its Second Session, the General Assembly adopted the provisional Rule of Procedure 142,[1] which is now numbered Rule 154:

> No resolution involving expenditure shall be recommended by a committee for approval by the General Assembly unless it is accompanied by an estimate of expenditures prepared by the Secretary-General. No resolution in respect of which expenditures are anticipated by the Secretary-General shall be voted by the General Assembly until the Administrative and Budgetary Committee has had an opportunity of stating the effect of the proposal upon the budget estimates of the United Nations.[2]

The related Rule 155 of the Rules of Procedure requires the Secretary-General to keep all committees informed of the detailed estimated cost of all resolutions which have been recommended by them for the General Assembly's approval. But the piecemeal reports on the financial implications of draft resolutions submitted by the Secretary-General to the main committees, or to other organs of the General Assembly, under Rule 155 and under the Financial Regulations have been of necessity cautiously confined to technical or book-keeping matters; and whereas related reports of the Advisory Committee have usually been candid in the scope of their observations, the reports on financial implications submitted by the Fifth Committee to the Plenary Session of the General Assembly under Rule 154 have again tended to be cautious and technical: the Fifth Committee being required only to state the effect of the proposal upon the budget estimates of the United Nations is reluctant to put forward recommendations adverse to a policy decision of another principal organ. With respect to the main budget estimates of the United Nations, however, which the Fifth Committee receives for *consideration* and recommendation, the Committee has been more willing to recommend to the Plenary Session changes in the estimates, especially if such changes have been suggested by the Advisory Committee.

This brings us to the question of the United Nations budget cycle. Under the Financial Regulations the Secretary-General, at least twelve weeks prior to the opening of the regular Session of the General Assembly, has to submit the budget estimates for the following financial year to the

[1] See G.A. Resolution 173 (II) of 17 November 1947, A/520, 12 December 1947, and Rule 152 in A/520/Rev.1, 1 January 1950.

[2] A/520/Rev. 8, March 1966.

Advisory Committee for examination.[1] These estimates have to be transmitted by him to all member States at least five weeks prior to the opening of the regular Session.[2]

Under Financial Regulation 3. 7, 'the budget for the following financial year shall be adopted by the General Assembly after consideration and report' by the Advisory Committee. However, subsequent to the submission of the main estimates, revised estimates for the same financial year may also be submitted in a broad range of cases, to the General Assembly under Financial Rule 103. 6, including 'those in respect of decisions of the Security Council, the Economic and Social Council or the Trusteeship Council'.[3] Thus, between the time of the preparation of the original estimates and the time of their consideration by the General Assembly, new decisions entailing either additional expenditure or the need for additional income are often taken by one or more of the organs of the United Nations, including the Economic and Social Council and committees of the General Assembly. In each such case, revised estimates are prepared in the same way as the original estimates and are submitted to the General Assembly which, after consideration and report by the Advisory Committee, eventually consolidates the amounts into a single appropriation resolution for the ensuing year.

Subsequently, under Financial Regulations 3. 8 and 3. 9, supplementary estimates are submitted for the current financial year. In addition to approving the budget estimates for the ensuing year therefore, the General Assembly at its regular annual Session may be required to consider estimates involving modifications to the appropriations for the current year. Such supplementary estimates are necessary because, after the budget has been voted, and during the financial year to which it relates, unforeseen and extraordinary expenses may arise which are incurred under the annual General Assembly resolution on unforeseen and extraordinary expenses. The Secretary-General is required to submit supplementary budget estimates at the subsequent Session of the General Assembly to cover those expenses. The supplementary estimates, as approved, are consolidated with the amounts approved at the previous Session, resulting in new appropriation figures for particular sections of the budget.[4]

In the consideration of the main budget estimates the General Assembly

[1] Financial Regulation 3. 5.

[2] Financial Regulation 3. 4.

[3] Rule 103. 6. para. (*c*). Among other cases in which revised estimates may be submitted, the Rule mentions those instances in which approval is required as a matter of urgency in the interests of peace and security, projects which the Secretary-General certifies to be of the highest urgency and which could not have been foreseen at the time the main budget estimates were circulated, and 'those mentioned in the initial budget estimates as items in respect of which later submissions would be made'.

[4] For an example of the annual resolutions on unforeseen and extraordinary expenses, see G.A. Resolution 2243 (XXI) of 20 December 1966.

exercises a measure of discretion, particularly when there are involved future programmes with regard to which no prior commitments yet exist. Here the General Assembly can exercise its powers to consider and approve the budget, and often it reduces the appropriations requested for various programmes as well as for the carrying out of the decisions of the Councils and of other organs of the Organization. The General Assembly feels particularly free to reduce the appropriation for the Secretariat. It can exercise discretion with regard to the main budget estimates both because the proposals it is considering relate to *future* programmes, and because the main estimates present a picture of the work of the Organization as a whole. With respect to revised estimates, however, the exercise of discretionary judgment by the General Assembly in practice is more limited, for these estimates are often considered piecemeal under the unsatisfactory procedure laid down in Rule 154.

The freedom of action of the General Assembly is even more limited where the approval of supplementary estimates is concerned. Here budget approval is often a purely ministerial act, for the General Assembly can hardly refuse to honour commitments already entered into either under the annual resolution on unforeseen and extraordinary expenses, or under the broad terms of Financial Rule 103.6.

It could be argued that by adopting the annual resolution on unforeseen and extraordinary expenses, and by not disputing Financial Rule 103. 6 promulgated by the Secretary-General,[1] the General Assembly has itself abdicated some of its discretionary powers concerning the budget of the United Nations. There is some merit in this argument, particularly in so far as the urgent 'unforeseen' projects, subject to the certification of the Secretary-General,[2] are concerned. It may well be, however, that even in the absence of these provisions the Councils would have felt free to make policy decisions involving expenditure, without taking into consideration the right of the General Assembly to consider and to approve the budget. These provisions were adopted in an attempt to introduce a semblance of order. Yet, the consistency of the present budgetary procedures with Article 17 (1) of the Charter could be questioned.

In an oral statement made on behalf of the Secretary-General on 10 June 1954 in the *United Nations Administrative Tribunal* case, the Legal Counsel of the United Nations discussed the various budgetary procedures under which payment of the awards of the Administrative Tribunal could be made, quite appropriately stressing that the General

[1] Financial Regulation 10. 1 (*a*) provides that the Secretary-General shall 'establish detailed financial rules and procedures in order to ensure effective financial administration and the exercise of economy'. Financial Regulations are adopted by the General Assembly as Resolutions. Financial Rules are promulgated by the Secretary-General subject to the Financial Regulations.

[2] See Financial Rule 103. 6 (*b*) and G.A. Resolution 2243 (XXI), para. 1 (*a*).

Assembly has only seldom an opportunity to consider whether or not the necessary means should be provided. Since these observations of the Legal Counsel may be relevant both to the awards of the Administrative Tribunal and to other questions, some excerpts may be cited:

> There are, in fact, four separate procedures which might be followed. As a first procedure, the Secretary-General could, if funds are available, make the payment from monies within the appropriate section of the Budget without affecting the total appropriated Budget. Under the Financial Regulations the annual Budget estimates are divided into parts, sections, chapters and articles. Normally, the Secretary-General can transfer funds from one article or chapter to another, so long as they remain within the same section without the need of reporting to or obtaining the concurrence of the Advisory Committee.
>
> As a second procedure, if sufficient funds are not available in the appropriate section of the Budget, the Secretary-General might make the payment by increasing the amount in any one section and decreasing correspondingly the amount in another section or sections with the prior concurrence of the Advisory Committee . . . and without affecting the total appropriated Budget . . .
>
> As a third procedure, the Secretary-General might, with the concurrence of the Advisory Committee, make the payment by a withdrawal from the Working Capital Fund provided that the awards could be considered as unforeseen and extraordinary expenses. He would then submit a revised total Budget in his supplementary estimates. . . . The appropriation by the General Assembly in such a case, however, is for the purpose of replenishing the Working Capital Fund and not for the purpose of payment which would already have been made . . .
>
> As a fourth procedure, the Secretary-General might request the General Assembly for funds for the direct payment of the awards by submitting supplementary estimates for this purpose. Such estimates are first submitted to the Advisory Committee on Administrative and Budgetary Questions.
>
> Only in the case of this last method, which in fact has been employed only with respect to the awards made in 1953, would the General Assembly have an opportunity to consider whether or not to appropriate the funds necessary to give effect to awards of compensation made by the Administrative Tribunal. Thus, under existing procedures and past practices, the opportunity of the General Assembly to consider an appropriation for the payment of specific awards is dependent on the fortuitous circumstance of whether or not funds are available in the current budget. On the other hand, the Assembly might, particularly with respect to the third procedure which I have described, discuss the matter after the payment had been made.[1]

The Budgetary Authority of the General Assembly and the Principal Organs of the Organization

Article 7 (1) of the Charter lists the principal organs of the Organization as 'a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat'. Yet, the status of the three Councils *vis-à-vis* the General Assembly is not the same. Under Article 60 of the Charter the responsi-

[1] *I.C.J. Pleadings*, 1954, pp. 289–90.

bility for carrying out the functions of the Organization set forth in Chapter IX of the Charter was vested in the General Assembly and, 'under the authority of the General Assembly', in the Economic and Social Council which was to have for this purpose the powers set forth in Chapter X. The concept of the functional authority of the General Assembly over the Economic and Social Council is also apparent in other Articles of the Charter.[1] As regards the Trusteeship Council, Article 85 provides that this Council 'operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.'[2] It is thus clear that the Charter gave the General Assembly certain authority over the functions assigned to the Economic and Social Council and the Trusteeship Council. No similar functional authority was granted to the General Assembly over the Security Council. It would, therefore, have been possible for the General Assembly to establish different budgetary practices with regard to the Economic and Social Council and the Trusteeship Council, on the one hand, and the Security Council on the other, and thus have a greater say in those decisions of the former two Councils which have important financial implications. It may be questioned, however, whether the Charter provisions concerning the functional authority of the General Assembly over the Economic and Social Council and the Trusteeship Council were intended to give the General Assembly power to intervene in specific decisions on this or that programme of work, or rather to enable it to set broad and general policy-directives. Be that as it may, the General Assembly did not seek to establish different procedures, and its Rules of Procedure and Financial Rules and Regulations apply equally to the three Councils.

As regards the International Court of Justice, the principal judicial organ[3] of the United Nations, Article 33 of the Statute of the Court provides that 'the expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly'. This provision is simply an adaptation of Article 33 of the Statute of the Permanent Court of International Justice.[4] Article 33 also has certain provisions concerning the remuneration and conditions of service of the members of the Court and of the Registrar. The expenses of the Court, which are listed in a separate section (Section 19) of the United Nations budget, can normally be forecast in the main budget estimates for the following financial year. Certain unforeseen expenses of the Court are already provided for in the annual resolutions of the General Assembly on

[1] e.g. Art. 66.

[2] See also Art. 87.

[3] For a discussion of the Court as a principal organ of the United Nations, see Rosenne, *The Law and Practice of the International Court* (1965), vol. 1, p. 68.

[4] Ibid., p. 226. See also Kelsen, *The Law of the United Nations* (1950), p. 503.

unforeseen and extraordinary expenses.[1] It is therefore not surprising that the Financial Rules and Regulations do not mention the possibility of the Court incurring obligations not explicitly provided for in the budget duly considered and approved by the General Assembly. Yet, should the Court be seized of an unexpected case which was not provided for in the budget, the Secretary-General could submit revised estimates under Financial Rule 103. 6[2] liberally interpreted and, with the concurrence of the Advisory Committee, enter into commitments under paragraph 1 of the annual resolution on unforeseen and extraordinary expenses. In any event, under Article 33 of the Statute the expenses of the Court, whether foreseen or not, would have to be borne by the United Nations. But the legal situation would probably have been the same even in the absence of Article 33, for the General Assembly as the budget-making organ has to provide the means for the fulfilment of the tasks entrusted to the other principal organs of the Organization.

In theory, the General Assembly could have complete budgetary control over the Secretariat of the United Nations. Indeed, the Secretariat's needs proper, i.e. the allocations for the payment of salaries and other allowances to the staff of the Secretariat as outlined in the manning-tables, are provided for by the General Assembly in the United Nations budget for the following year, and the various conditions of service are established by the General Assembly in the staff regulations, under Article 101 (1) of the Charter. Other expenses of the United Nations Secretariat can also be provided for in the budget for the following financial year. As the requirements of the Secretariat can normally be foreseen in advance, the General Assembly has the opportunity duly to consider and approve the relevant sections of the budget, and it often exercises its prerogative to introduce changes and reductions in the estimates for the Secretariat prepared by the Secretary-General.

Under Article 98 of the Charter, the Secretary-General 'shall perform such . . . functions as are entrusted to him' by the General Assembly and the three Councils. Unlike the Councils, the Secretariat cannot, in theory, make decisions financial implications of which would tie the hands of the General Assembly. The Secretariat is primarily a service organ, and its expenses result largely from work-programmes decided on by the other principal organs. In practice, however, the situation is not quite so simple.

The Secretary-General, who is 'the chief administrative officer of the Organization' under Article 97 of the Charter, has been given in Article 99

[1] See, in general, Rosenne, op. cit., pp. 223–7.

[2] Under subparagraph (*a*), which deals with instances where approval is required as a matter of urgency in the interests of peace and security, or under subparagraph (*b*), which applies to 'projects' which the Secretary-General certifies to be of the highest urgency and which could not have been foreseen when the main budget estimates were circulated.

the political authority to bring to the attention of the Security Council 'any matter which in his opinion may threaten the maintenance of international peace and security'. Many resolutions of the principal organs of the Organization have given the Secretary-General important responsibilities which go beyond the normal scope of activities of a service organ. There has been a growing recognition of the role of the Secretary-General in the field of peace-keeping and in the peaceful settlement of disputes (although that role is still considered by some *ultra vires* the functions of the Secretary-General under the Charter). It is not surprising, therefore, that the General Assembly should have delegated to the Secretary-General, through the annual resolution on unforeseen and extraordinary expenses, the authority, without need for the concurrence of the Advisory Committee,[1] to enter into such commitments not exceeding a total of $2 million 'as the Secretary-General certifies relate to the maintenance of peace and security'. While it is true that this authority of the Secretary-General derives from a delegation of power by the General Assembly, it is also true that within the limits of this authority the General Assembly has relinquished its right to consider the budget. Moreover, not all the expenses of the United Nations Secretariat can be foreseen and provided for in advance, for new and urgent items of expenditure may come up after the adoption of the budget for a given financial year. Increases in expenditure can also result from unavoidable rises in salaries, wages or prices, required to maintain the previous year's levels of staff, supplies or services. It was in view of this that the General Assembly in Resolution 2004 (XIX), para. 1, of 18 February 1965 on Interim Financial Arrangements and Authorizations for 1965, authorized the Secretary-General 'subject to statutory requirements, to enter into commitments . . .'. This resolution was adopted without discussion during the abortive Nineteenth Session of the General Assembly, and the term 'statutory requirements' has been justly criticized[2] as being inappropriate, and has not reappeared in the resolutions of the General Assembly.

However, leaving aside the question of this unfortunate terminology (salaries may be governed by regulations, but neither salaries nor prices are subject to statutes),[3] the fact is that in practice the Secretary-General sometimes has to enter into commitments which cannot be considered in advance by the General Assembly. In such cases the Secretary-General

[1] See G.A. Resolution 2243 (XXI), para. 1 (*a*).

[2] See the statement made on 20 October 1965 by Mr. J. Gibson, the Representative of the United Kingdom in the Fifth Committee (*G.A.O.R.*, Twentieth Session, 1073rd Meeting of the Fifth Committee, paras. 17–18), in which he discussed in detail the use, in this connection, of terms such as 'statutory' or 'mandatory' expenses.

[3] See also the *Report of the Fifth Committee*, dated 21 December 1965, on Agenda Item 76, A/6222.

submits to the General Assembly revised or supplementary estimates. Sometimes therefore the General Assembly's consideration of the expenses of the Secretariat is *ex post facto*. In these cases too, the General Assembly has to honour obligations of the Organization incurred by the Secretariat.

The General Assembly's Power to review Decisions of other Principal Organs

The distinction between the budgetary power of the General Assembly and its power to review decisions of other principal organs has already been touched upon but it is necessary now to pursue it a little further. It has already been pointed out that the General Assembly has *locus standi* with regard to the functions of the Trusteeship Council, the Economic and Social Council and, of course, the Secretariat. It has no authority with regard to the substantive work of the International Court of Justice (as distinct from its budget) although it may request from it advisory opinions; and has no functional authority over the Security Council. Yet even where the General Assembly shares with another organ in the process of decision-making, the General Assembly alone has budgetary authority.

Thus the Government of Australia, in the written statement it submitted to the International Court of Justice in the case of *Certain Expenses of the United Nations* argued:

> In many matters, responsibility under the Charter of the United Nations is shared between the General Assembly and the Security Council, or between other organs of the United Nations. Illustrations are to be found in such matters as membership of the Organization; the pacific settlement of disputes; the maintenance of international peace and security; international economic and social co-operation, and the international trusteeship system. In all these instances where functions and responsibilities are shared by more than one of the principal organs, the Charter explicitly delimits the functions and responsibilities of each. This characteristic of the Charter strikingly reinforces the inferences which would naturally be drawn from the fact that no organ other than the General Assembly is vested with any explicit authority to make budgetary decisions. The inference is that the budgetary authority of the General Assembly is both complete and exclusive.[1]

In certain cases the General Assembly may intervene in the decision-making process of other principal organs, as for instance when the Charter grants it such authority, or when a particular matter has been referred by the General Assembly to another organ for study and report. But even if the General Assembly cannot intervene in the decision-making process in a particular set of circumstances, there remains the question of the approval of the budget. This function belongs to the General Assembly alone, which can always use its own judgment in determining the amount of the appropriation required. This discretion to make reductions in the budget is important, for it may indirectly affect the implementation of

[1] *I.C.J. Pleadings*, 1962, p. 231.

the decisions made by another principal organ. However, in such cases the process of 'consideration and approval' of the budget is not completely discretionary. When, acting within their authority under the Charter, the organs of the Organization make decisions which are final and not subject to any review by the General Assembly, these organs may create obligations for the United Nations Organization as a whole. These obligations have to be honoured and the General Assembly has to provide the necessary means. The power of 'consideration and approval' may, therefore, sometimes be limited to deciding the sum of money required. If the appropriations proposed for a certain item cannot be reduced, the General Assembly may try to reduce expenditure on other items of the budget.

The Representative of Norway, Mr. Evensen, said before the International Court of Justice in the case of *Certain Expenses of the United Nations* that 'the General Assembly does not have a discretionary and unlimited budgetary power under the Charter'.[1] Then, referring to the Court's Advisory Opinion of 13 July 1954 concerning the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, Mr. Evensen went on to say:

> It is clear from the Court's findings that the Court did not consider the budgetary role assigned to the General Assembly under Article 17 as unlimited and discretionary. . . .
>
> The Court's findings are the firmly established practice of the United Nations . . . The Administrative Tribunal was a subsidiary organ of the United Nations established by the General Assembly. It goes without saying, *these basic findings of the Court apply even more so with regard to the main organs.* Thus, one has no reason to fear that the General Assembly's role as the budgetary and financial organ is unlimited and discretionary.[2]

Similarly, the Government of Denmark declared, in its written statement before the Court in the case of *Certain Expenses of the United Nations*, that while various Articles of the Charter circumscribe the functions of the General Assembly so as to avoid encroachments on the powers of other principal organs, and in particular of the Security Council, the

> . . . fiscal power as defined by Article 17 is not subject to any similar limitation. No share of the fiscal power is left to any other organ of the United Nations. Even the most independent of all the principal organs, the International Court of Justice, is subject to the fiscal power of the General Assembly. It is true that this is not in all respects a free and discretionary power.[3]

The Government of Denmark declared further:

> . . . as long as the Assembly respects the decision of substance it remains its own master with regard to the solution of any budgetary problem to which that decision may give rise. When the Security Council has decided to adopt a measure within its competence under the Charter, the General Assembly cannot nullify the effects of

[1] Ibid., p. 367. [2] Ibid., pp. 367–8 (italics supplied). [3] Ibid., p. 150.

that decision by refusing any necessary appropriation . . . The mere fact that the substance of the measure lies within the field of another organ does not give that other organ a share in the fiscal power.[1]

This may well be true. But if the General Assembly always has to give effect to such a decision by granting the necessary appropriations, then its power under Article 17 (1) of the Charter—except for the possibility of determining the exact amount required—ceases to be discretionary. This was recognized by Mr. Riphagen, representing the Government of the Netherlands before the Court in the same case, when he said:

. . . it is obvious that the General Assembly, in the *exercise* of its fiscal power, may be under a legal duty to take into account the fact that some other organ has—within the limits of its powers—taken a decision or acted in a way which entails legal consequences for the United Nations.[2]

Indeed, Mr. Riphagen went on to say,

. . . possible duties of the General Assembly in respect of the exercise of its fiscal power . . . might be the legal expression of the need to avoid contradiction and conflict between the general fiscal power of the General Assembly and the other rights and powers recognized or stipulated in the Charter.[3]

Advisory Opinion on the United Nations Administrative Tribunal

The Advisory Opinion of the International Court of Justice on the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* (1954), arose out of a disagreement in the Fifth Committee of the General Assembly whether to approve the request of the Secretary-General for a supplementary appropriation of $179,420 to cover awards made in certain cases by the United Nations Administrative Tribunal. The Advisory Committee agreed to the request, but as no funds were available in the current budget, the Secretary-General had to request a supplementary appropriation.

The facts of the case are well known and need not be repeated here. Suffice it to say that, in view of 'important legal questions' which had been raised in the Fifth Committee, the General Assembly decided on 9 December 1953 to submit the following legal questions to the International Court of Justice for an advisory opinion:

1. Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?

2. If the answer given by the Court to question (1) is in the affirmative what are the principal grounds upon which the General Assembly could lawfully exercise such a right?[4]

[1] *I.C.J. Pleadings*, 1962, p. 151.
[2] Ibid., pp. 315–16.
[3] Ibid., p. 316.
[4] G.A. Resolution 785 (VIII).

The written statement submitted to the Court by the Secretary-General contains an excellent summary of the views expressed in the General Assembly on the questions submitted to the Court:[1] it may be observed that most of the member States were of the opinion that the General Assembly was obliged to pay the awards, bearing in mind their finality, the nature of the tribunal and the contractual obligations of the United Nations.

Some States, particularly those opposing the request for supplementary appropriations, made certain observations regarding the broader question of the budgetary powers of the General Assembly and its discretion, both in general and *vis-à-vis* other principal organs. Thus the Representative of the United States, Mr. Richards, said that under Article 17 of the Charter the appropriations concerned had to be considered and approved and that the General Assembly could not relinquish that power to the Administrative Tribunal. He went on to say that 'under the Charter, not even the Councils had the authority to appropriate funds: that power was reserved to the General Assembly meeting in plenary session and voting by a two-thirds majority'.[2] Similarly, Sir Percy Spender of Australia argued that, by adopting the Statute of the Administrative Tribunal, 'the General Assembly had not abdicated its appropriation power, and even had it so desired, it had no authority to do so under the Charter'.[3] The representative of Cuba, Mr. Blanco, stated that while the Secretary-General had fulfilled his obligations by requesting the necessary funds, the General Assembly was 'in a different position, [for] it had sovereign rights which it could not renounce'.[4]

The representative of Turkey, Mr. Vaner, said that to negate the Assembly's power of review of the budgetary aspects of the Tribunal's decisions would 'be contrary to the provisions of the Charter and would derogate from the sovereign rights of the States members of the United Nations'.[5] The representative of Chile, Mr. Ortega Masson, said that while the General Assembly was not entitled to review the awards, it 'had the right to decide on the necessary budgetary appropriations'.[6]

Some representatives based their arguments against any obligation of the General Assembly to approve supplementary estimates on the fact that the Administrative Tribunal was a subsidiary rather than a principal

[1] *United Nations Administrative Tribunal, I.C.J. Pleadings*, 1954, pp. 195–218.

[2] *G.A.O.R.*, Eighth Session, 420th Meeting of the Fifth Committee, 3 December 1953, para. 38.

[3] Ibid., 421st Meeting of the Fifth Committee, 4 December 1953, para. 28. See also the statement by the representative of Argentina, in para. 52.

[4] Ibid., 423rd Meeting, 5 December 1953, para. 14.

[5] Ibid., 425th Meeting, 7 December 1953, para. 38.

[6] Ibid., 427th Meeting, 8 December 1953, para. 29.

organ. Thus Mr. Franco y Franco of the Dominican Republic stated that it 'would be contrary to the Charter if a subsidiary organ could impose an additional financial burden on the Organization and its members without any possibility of review by the General Assembly'.[1] And Mr. Blanco of Cuba argued that the Administrative Tribunal, having been established by the General Assembly, 'was therefore not in the position of an organ with constitutional origin and independence. The Tribunal could not, therefore, as a subsidiary organ, create obligations binding the General Assembly'.[2]

Some delegates who favoured the approval of the supplementary estimates introduced into the debate a fundamental distinction between the General Assembly's 'powers' and 'rights'. Thus Mr. Asha of Syria felt 'that there was perhaps some confusion between "power" and "right"'. No one would contest the power of the General Assembly to approve or to refuse appropriations, but it was certainly not within its rights to fail to meet its contractual financial obligations.[3] Similarly Mr. Engen of Norway expressed concern about the 'exaggerated insistence on the powers of the General Assembly without regard to what the General Assembly had the right to do'.[4] If the General Assembly did not honour its obligations, it 'would take a decision based not on law but on the exercise of arbitrary power'.[5]

Mr. Tammes of the Netherlands, in his statement before the Court, analysed the concept of the budgetary power of the General Assembly and suggested that the 'discretionary power of the General Assembly to consider and approve the Budget of the Organization should be interpreted restrictively as far as international obligations of the Organization are involved'.[6] He concluded that 'in its discretion to approve the Budget, the General Assembly is bound by general principles of law and has not the right to refuse to give effect to the financial obligations of the Organization *ex contractu*, *ex delicto*, and particularly to the financial obligations following from the final decisions of arbitral or judicial tribunals whose jurisdiction has been accepted by the Organization'.[7]

Of particular relevance to the problem under discussion is the statement made before the Court by Sir Reginald Manningham-Buller, representing the United Kingdom Government, for the first major issue discussed by him was 'the position and functions of the General Assembly under Article 17 with regard to a liability incurred by another principal organ of

[1] *G.A.O.R.*, Eighth Session, 423rd Meeting of the Fifth Committee, 5 December 1953, para. 55.
[2] Ibid., para. 11. (See the discussion on the Rules of Procedure of the Industrial Development Board of the U.N. Industrial Development Organization in the *Report . . . on Rules of Procedure*, ID/B/16, 25 April 1967, pp. 6–8).
[3] Ibid., 425th Meeting, 7 December 1953, para. 21.
[4] Ibid., 426th Meeting, para. 52.
[5] Ibid., para. 53.
[6] *United Nations Administrative Tribunal, I.C.J. Pleadings*, 1954, p. 381.
[7] Ibid., p. 382.

the United Nations'.[1] Sir Reginald rejected the view that the General Assembly was 'a sovereign body' and drew attention to the character of the United Nations and its constitution:

> The United Nations Organization is not composed of several independent organizations: it is one organization, of which the General Assembly and the Secretariat are two of the principal organs . . . Each organ has its own functions to perform on behalf of the Organization. Each is responsible in its own field, but each acts not on its own behalf but on behalf of the Organization of which it forms part. Each organ is . . . the agent within its sphere of the United Nations . . . the General Assembly . . . is not the United Nations itself. It is just one of the principal organs . . .[2]

Sir Reginald went on to say that the Organization had juridical personality and was capable of incurring duties and obligations 'in the private, as well as in the public, sphere'.[3] He concluded that the 'Assembly has no legal right to refuse to give effect to obligations entered into by the United Nations, and no legal right to repudiate a liability incurred by another principal organ in the proper discharge of its functions'.[4] Under Article 17 of the Charter the General Assembly has 'the duty of considering and approving the Budget of the Organization. In performing that duty it is acting not for itself, but on behalf of the United Nations as a whole.' Sir Reginald too made the distinction between 'power' and 'right':

> It is of course within the power of the Assembly to omit any particular item from its Budget. If it does so, there is no appeal from its decision. It has power to omit to make any provision for payment of a particular liability, but it does not follow from that, from the possession of this power, that it has the legal right to repudiate a liability of the United Nations, whether incurred by the Secretariat or by any other organ of the United Nations in the exercise of its functions.[4]

He concluded his argument on the relationship between the General Assembly's budgetary powers and the obligations incurred by other principal organs by stating that the General Assembly 'has no more right to refuse payment of a liability incurred by the Secretariat than it has to refuse to make financial provision for this Court. It has the power to omit to make financial provision for this Court in the Budget, as it has power to omit to make financial provision for any liability, but as I have said, possession of that power is a very different thing from possession of a right, a legal right, to refuse payment.'[5] It was precisely this question of the General Assembly's power not to make provision for the Court which became an issue in a tense political atmosphere during the Twenty-first Session of the General Assembly. This issue is discussed in the next section.

The bulk of the Court's Opinion dealt with questions relating particularly to the Administrative Tribunal, its establishment by the General Assembly,

[1] Ibid., p. 358. [2] Ibid., p. 359. [3] Ibid., p. 360.
[4] Ibid., p. 361. [5] Ibid., pp. 361–2.

its functions and its awards. The Court did, however, also consider briefly the broader argument that in light of Article 17 (1) of the Charter an implied limitation upon the General Assembly's express budgetary powers was not legally admissible. This argument was rejected by the Court as follows:

> The Court notes that Article 17 of the Charter appears in a section of Chapter IV relating to the General Assembly, which is entitled 'Functions and Powers'. This Article deals with a function of the General Assembly and provides for the consideration and approval by it of the budget of the Organization. Consideration of the budget is thus an act which must be performed and the same is true of its approval, for without such approval there can be no budget.
>
> But the function of approving the budget does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it; for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements. The question, therefore, to be decided by the Court is whether these obligations comprise the awards of compensation made by the Administrative Tribunal in favour of staff members. The reply to this question must be in the affirmative.[1]

In its majority Opinion adopted by nine votes to three, the Court replied in the negative to the first question submitted to it. While the Court's Opinion deals with the particular problem of a judicial body established by the General Assembly, yet it makes it clear that the budgetary power of the General Assembly is not absolute, and that that organ has to honour obligations already incurred by the Organization.

The Supplementary Estimates for the Financial Year 1966 arising out of the South-West Africa *case*

During its Twentieth Session, the General Assembly decided in Resolution 2125 of 21 December 1965—Budget for the Financial Year 1966—to appropriate, under section 19 of the budget, the amount of $1,074,100 for the expenses of the International Court of Justice. On 23 September 1966, the Secretary-General submitted to the Twenty-first Session of the General Assembly, under agenda item 73 on Supplementary Estimates for the Financial Year 1966, a report asking for the approval of a revised estimate of $1,146,600 under section 19.[2] The Secretary-General explained that the additional $72,500 was required, in part, to cover additional expenditures estimated at $29,000[3] for the designation of *ad hoc* judges in the *South-West Africa* case and incurred under paragraph 1 (*b*) of the General Assembly Resolution 2126 (XX) of 21 December 1965 on Unforeseen and Extraordinary Expenses for the Financial Year 1966, for further

[1] *I.C.J. Reports*, 1954, p. 47, at p. 59.

[2] A/6436, p. 40.

[3] After the close of the Twenty-first Session of the General Assembly this sum was adjusted downwards to $22,905. See A/6666, p. 32.

expenses for temporary assistance for the increased work-load resulting for the Court from the *South-West Africa* case, and for the translation of documents in the *Barcelona Traction, Light and Power Company Ltd.* case. The Secretary-General did not provide a breakdown of the temporary assistance costs attributable to the *South-West Africa* case and to the *Barcelona Traction, Light and Power Company, Ltd.*, case respectively.[1]

The Advisory Committee which, under Rule 158 of the Rules of Procedure of the General Assembly is responsible for expert examination of the budget and for assisting the Fifth Committee[2] and which under Financial Regulation 3. 9 must review supplementary estimates, did not recommend any reductions in the supplementary estimates presented under section 19.

The approval of the supplementary estimates by the Fifth Committee in such circumstances is normally regarded as a routine matter. But the dissatisfaction prevailing in the General Assembly over the outcome of the *South-West Africa* case made the consideration of section 19 anything but routine. During the 1124th meeting of the Fifth Committee on 10 October 1966, the representative of Guinea, Mr. Kouyate, speaking on behalf of the African group, asked that a separate vote be taken on the requested increase of $72,500. He announced that the African group would vote against the increase and, if it were approved, would abstain on section 19 as a whole.[3] In the course of the debate which followed, the representative of Tanzania, Mr. Mtingwa, said:

> Africans had a high respect for law, but only if that law was fair and was not swayed by political considerations. That could not be said of the International Court's decision in the South-West Africa Case. The Court, moreover, had spent six years on what it claimed was a question of procedure. If it was as inefficient as that, it could hardly expect an increase.[4]

Mr. Quijano of Argentina, arguing for the approval of the supplementary appropriations, pointed out that the request was in conformity with the Statute of the Court and that 'to oppose such an appropriation because of disagreement with a particular decision by the Court would set a dangerous precedent. If the right of United Nations organs to funds was to depend

[1] According to the Report of the Secretary-General, the temporary assistance expenses amounted to $126,000, exceeding by $71,000 the original credits of $55,000 approved for this purpose. However, by offsetting certain unexpended balances, under section 19, against the additional costs under this section, the Secretary-General estimated the deficit under this section as a whole to amount to $72,500. Calculations made after the Twenty-first Session of the General Assembly revealed, however, that the total amount of obligations and expenditures incurred was $1,103,429 as against the original appropriation of $1,074,100. The deficit amounted, therefore, to only $29,329.

[2] Regarding the composition and the role of the Advisory Committee, see Meron 'Administrative and Budgetary Co-ordination by the General Assembly', in *U.N. Administration of Economic and Social Programmes* (ed. by Mangone, 1966), pp. 83 et seq.

[3] A/C. 5/SR. 1124, para. 4.

[4] Ibid., para. 8.

on such subjective judgments, the result might be to paralyze them.'[1] Similarly, Ambassador Hambro of Norway argued that the Fifth Committee was concerned solely with budgetary matters: 'It would indeed be a dangerous precedent to deny an organ funds because of disagreement with a particular decision. The supplementary estimates were in part a reflection of mandatory provisions concerning the appointment of *ad hoc* judges. They also corresponded to expenditure necessary for the proper working of the Court, *inter alia*, in the case concerning the *Barcelona Traction*.'[2]

Senator Church of the United States argued that the issue was not apartheid, or the decision of the Court, but 'whether or not obligations properly incurred by a United Nations organ were to be met'.[3]

Mr. Bakoto, the representative of Cameroun, denied that African States were passing 'a subjective judgment on the Court's verdict . . . The budget was the translation into financial terms of a certain political trend; it was permissible to condemn a trend . . . Under its Statute, the International Court of Justice was supposed to base its judgments on certain norms. These norms had not been respected.'[4]

In reply to a question the representative of the Secretary-General said that the bulk of the additional expenditures had already been spent. If the supplementary appropriations were not approved, 'the Secretary-General would have to find the sum required within the totality of appropriations voted by the General Assembly for 1966. The concurrence of the Advisory Committee would be required before funds saved in other sections could be transferred to meet the deficit in section 19.'[5] In accordance with the request of Guinea, a separate vote was taken on the request for an additional appropriation of $72,500 for section 19. The additional appropriation was rejected by the Fifth Committee by 40 votes for the rejection, 27 against and 13 abstentions. The question was not reopened in the Plenary Session, and thus the General Assembly denied certain appropriations to another principal organ of the United Nations, the International Court of Justice. Certain observations about the legal and procedural aspects of the case here under discussion are now called for.

The Fifth Committee voted on the entire additional appropriation of $72,500, and did not take a separate vote on its various components; but from the legal standpoint the position was different as regards the provision for temporary assistance for needs not foreseen in the original budget estimates for 1966, and that relating to the expenses occasioned by the designation of *ad hoc* judges.

[1] A/C. 5/SR. 1124, para. 9. [2] Ibid., para. 10. [3] Ibid., para. 15. [4] Ibid., para. 17.
[5] Ibid., para. 16. See also the excellent Summary of the debate in the *Report of the Fifth Committee on Supplementary Estimates for the Financial Year 1966*, dated 12 December 1966, A/6590, para. 15.

Translation, printing, etc. could perhaps have been postponed until provision for them could be made in the budget estimates for the financial year 1967. It could be argued that the Court was not authorized to exceed the appropriations duly approved by the General Assembly for the financial year 1966.[1] But even if one could criticize the action of the Court in terms of proper budgetary procedures, the fact was that the Court had entered into certain commitments, prima facie within its authority, and it is difficult to see how the General Assembly could fail to honour such commitments which, of course, bind the Organization as a legal person.

The position with respect to the expenses occasioned by the designation of *ad hoc* judges was even more clear-cut. As already explained the General Assembly, acting on the recommendation of the Fifth Committee, adopts each year a resolution on unforeseen and extraordinary expenses for the following financial year. Resolution 2126 (XX) for the year 1966 authorized the Secretary-General to enter, without need for the concurrence of the Advisory Committee, into 'such commitments as the President of the International Court of Justice certifies relate to expenses occasioned by: (i) the designation of *ad hoc* judges (Statute of the Court, Article 31) not exceeding a total of $37,500'. The related resolution on the Working Capital Fund for the financial year 1966 (Resolution 2127 (XX) of 21 December 1965) authorized the Secretary-General to advance from the Working Capital Fund 'such sums as may be necessary to finance commitments which may be duly authorized under the provisions of the resolutions adopted by the General Assembly, in particular Resolution 2126 . . . the Secretary-General shall make provision in the budget estimates for reimbursing the Working Capital Fund'.[2] It is thus clear that the payment of compensation to *ad hoc* judges was made not only in accordance with the Statute of the Court, but also in accordance with the delegation of authority to the Secretary-General to expend money up to a certain limit, subject to the certification by the President of the Court. In the present case the obligation incurred with respect to the *ad hoc* judges was well below the limit established in paragraph 1 (*b*) (i) of General Assembly Resolution 2126 (XX). As already mentioned, the bulk of the additional sum requested had in fact already been expended (having been advanced from the Working Capital Fund under paragraph 4 (*b*) of Resolution 2127 (XX)). The approval of supplementary estimates by the General Assembly, in so far as the authorized payment to *ad hoc* judges is concerned, is a matter on which the General Assembly has no discretion, having

[1] Under paragraph 1 of the G.A. Resolution 2126 (XX) on Unforeseen and Extraordinary Expenses, the Secretary-General could have entered commitments with respect to the unforeseen expenses of the Court, with the prior concurrence of the Advisory Committee. However, in this particular case such concurrence had not been requested.

[2] Para. 4 (*b*).

delegated its budgetary authority in the annual resolutions on unforeseen and extraordinary expenses. The approval should, therefore, have been a routine, or ministerial act; but in a political body the political sentiment may sometimes prevail, and the request was denied.

Under paragraph 4 (*b*) of Resolution 2127 (XX) the Secretary-General is obliged to make provision in the budget estimates for reimbursing the Working Capital Fund. As a result of the rejection of the supplementary estimates by the General Assembly, there remained a deficit in the budget. The representative of the Secretary-General advised the Fifth Committee that the Secretary-General would have to find the sum required[1] within the totality of the appropriations voted by the General Assembly. This gives rise to a rather delicate situation: Under Financial Regulation 4. 5 'no transfer between appropriation sections may be made without authorization by the General Assembly.'[2] However, this authority of the General Assembly is delegated annually to the Advisory Committee. Thus, paragraph 2 of Resolution 2125 (XX), Part A, authorized the Secretary-General to transfer credits between sections of the budget with the prior concurrence of the Advisory Committee. In the present case the Advisory Committee, a subsidiary body of the General Assembly, has a difficult choice to make: either to approve the transfer in spite of the rejection of the additional requirements by its parent body (could it legally do so?) or leave a deficit in the budget. In the latter case, the Secretary-General would not be able to fulfil his obligations under paragraph 4 (*b*) of Resolution 2127 (XX) relating to the Working Capital Fund.

Conclusions

Article 17 (1) of the Charter, interpreted literally and in isolation, might suggest that the General Assembly has complete discretion whether, after having considered a part of the budget, it should approve it or not. The *travaux préparatoires* of this Charter provision indeed suggest that the founding fathers of the United Nations did not consider limiting the discretion of the General Assembly, which was to be the only principal organ of the Organization endowed with authority to consider and to approve the budget of the Organization. Such an interpretation would, however, impair the ability of the Organization to fulfil its functions and achieve its purposes as defined in the Charter. The Charter established several principal organs and gave each of them certain functions. When these organs, acting within their authority under the Charter, adopt decisions which

[1] After downward adjustment $29,329.

[2] The Secretary-General thus may transfer credits between the different chapters of the same sections of the budget. Since chapters of the same section may deal with entirely unrelated matters, credits may in fact be used by the Secretary-General for different budget items from those intended by the General Assembly.

require financial appropriations and which the General Assembly in the circumstances of the case cannot review, the General Assembly has a legal duty to provide the necessary financing, for it is under a legal duty to make the functioning of the various principal organs possible and may not hamper it. It has to honour the Organization's *ex contractu*, *ex delicto* and other obligations incurred through the activities of the principal organs acting within the limits of their authority under the Charter.

The General Assembly has the power not to approve the necessary appropriations but it has not the legal right to do so, and the responsibility of the Organization may be engaged as a result of such a refusal, whether in public or in private law (leaving aside any question of jurisdiction).

The General Assembly has considerable discretion in considering the future finances of the Organization, in the absence of already existing, or continuing obligations, when the other principal organs have not yet made decisions which might limit the scope of its discretion. The General Assembly also has the right, in good faith, to determine the precise amounts required, the modalities of financing, etc., always subject to its legal duty not to impair—by introducing unreasonable reductions—the functioning under the Charter of another principal organ.

It follows, therefore, that the discretion of the General Assembly in approving the budget is often limited and sometimes entirely absent.

This interpretation of Article 17 (1) is supported by the constant practice of the Organization, the isolated case of the rejection of the supplementary estimates for the International Court of Justice in 1966 notwithstanding. (That case shows, however, that being a political body, the General Assembly may, in extreme political circumstances, exercise its *power* not to approve particular appropriations.) This interpretation is also supported by the views of certain governments as reflected in their written and oral statements in certain proceedings before the International Court of Justice.

As regards obligations already incurred by the Organization, the Court in its Advisory Opinion on the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal* said clearly that the function of approving the budget 'does not mean that the General Assembly has an absolute power to approve or disapprove the expenditure proposed to it, for some part of that expenditure arises out of obligations already incurred by the Organization, and to this extent the General Assembly has no alternative but to honour these engagements'.[1] Such obligations comprise, no doubt, obligations incurred by other principal organs of the Organization. Even where no obligations have been incurred, the General Assembly has to make the necessary appropriations to enable the proper functioning

[1] *I.C.J. Reports*, 1954, p. 47, at p. 59.

of the other principal organs. Thus the General Assembly is in duty bound to take into account the purposes and functions of all the principal organs and of the Organization as a whole, as specified or implied in the Charter and developed in practice.[1]

This is entirely consistent with the current thinking on the rules of interpretation of treaties. Article 27 (1) of the recently adopted draft articles on the Law of Treaties provides that 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[2] In its Commentary, the International Law Commission expresses the view that

> . . . the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation . . . which requires that a treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.[3]

And elsewhere the Commission adds that 'the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose'.[4]

It is clear that an interpretation of Article 17 (1) of the Charter in isolation and out of context, which would attribute to the General Assembly a complete discretionary right to approve or not to approve the United Nations budget, would impair the functioning of the other principal organs and make impossible the furtherance of the purposes of the Organization.

[1] See, in general, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, *I.C.J. Reports*, 1949, p. 174, especially p. 180.

[2] *G.A.O.R.*, Twenty-first Session, Supplement No. 9, p. 7, at p. 49.

[3] Ibid., p. 50.

[4] Ibid., p. 52, para. 12.

THE JUSTICIABILITY OF DISPUTES AND ISSUES IN INTERNATIONAL RELATIONS*

By DR. IAN BROWNLIE
Fellow of Wadham College, Oxford

I. INTRODUCTION

THE object of this article is to examine the limitations of the judicial function apart from matters of jurisdiction in the technical sense. The possible existence of cogent reasons for not approaching certain issues in the judicial forum is a subject which overlaps with questions commonly classified as matters of admissibility and which may appear in a variety of formal guises. The intention is not to minimize or denigrate the judicial function but to assess in a preliminary way the different types of environment in which it may operate. The exercise must have a preliminary character in the sense that the issues trench on large questions about the function of law and the scope of an article is clearly limited; and it could also be said that the exercise, of whatever scope, ought to be carried out with caution since the inherent character of the subject-matter hardly admits of dogmatic treatment. By the environment in which the judicial function may operate is meant the special features of the issues themselves and of the way in which they are formulated before a court comes to deal with them. Quite deliberately the illustrations are drawn from both national and international jurisdictions since the problems are sufficiently similar in the two settings to make comparison instructive.

The writer who takes up the problems of the justiciability of disputes has some duty to explain why it is thought that there is anything to be said which adds to the substance of Hersch Lauterpacht's book *The Function of Law in the International Community* which was published in 1933. In that work Lauterpacht produces cogent arguments, buttressed by extensive reference to the experience of tribunals, to establish three propositions: (i) that no tribunal dealing with matters of international law is justified in refusing to decide an issue on the ground of *non liquet*, i.e. the absence of applicable rules of law to cover the matter; (ii) that the large scale of a problem does not make it less susceptible to adjudication according to

* © Ian Brownlie, 1968. This article is based upon a paper delivered at a meeting of the Cambridge International Law Club in February 1968. The nature of the presentation does not readily accommodate a critical assessment of the recent literature bearing on the subject-matter, though I have taken the relevant literature into account. Recent items of significance include the following: Rosenne, 'On the Non-Use of the Advisory Competence of the International Court of Justice', this *Year Book*, 39 (1963), p. 1; and Rosalyn Higgins, 'Policy Considerations and the International Judicial Process', *International and Comparative Law Quarterly*, 17 (1968), p. 58.

law; and (iii) that the political character of some disputes does not remove or dominate over the legal nature and inherent justiciability of all disputes. To some extent these propositions may now seem obvious but until Lauterpacht's book appeared they were probably not generally accepted. In what follows Lauterpacht's propositions are taken substantially for granted and an attempt is made to take matters further on the basis of two assumptions. The first assumption is that Lauterpacht's study, whilst clearing the air in many ways, nevertheless left certain items on the agenda: those who accepted his logical position might continue to suspect that other sources of difficulty remained to be considered. The second assumption is that Lauterpacht's book, perhaps inevitably in 1933, has a somewhat defensive air about it. He, like many others, tends to approach the problem by saying, as it were, that international law has more equipment than is sometimes realized and measures up to municipal law quite well, given its different conditions of operation. The policy adopted by the present writer is to present matters differently and to take a less apparently complacent view of the viability and confidence of municipal law. The intention will be to see how in certain respects municipal law compares with the operation of international law without taking the one as the measure of the other.

II. Reasons Asserted for Non-Justiciability

It is now necessary to test in a provisional way the reasons of law and policy for refusing to deal with a dispute or issue judicially. Some of the grounds catalogued below are at best only candidate arguments, but a widely ranging survey usefully establishes the general picture and has some value of its own.

(i) *It may be said that a more suitable forum is available*

This is a considerable factor in the appearance and persistence of the local remedies rule: States have been reluctant to deal with diplomatic claims concerning private interests provided local remedies were available. As Lord McNair says: 'One obvious result of this course is that it may at any rate lead to a clarification of the facts and a liquidation of the damages.'[1] What is perhaps not always appreciated is the extent to which the local remedies rule has counterparts in other areas of law. English rules of conflict of laws include the principle of *forum non conveniens*,[2] and in other spheres recent English decisions provide interesting parallels. In *Sammy* v.

[1] *International Law Opinions*, vol. 2, p. 312. See also *British Digest of International Law*, vol. 6 pp. 253 (report of 25 February 1892), 345 (report of 14 March 1864), 347 (report of 25 March 1851).

[2] For a recent example, see *Re Kernot* (*An Infant*), [1965] Ch. 217.

Birkbeck College[1] and *Thorne* v. *University of London*[2] the Court of Appeal applied the principle that actions relating to domestic disputes between members of a university are matters which are to be dealt with by the Visitor and therefore the Court is without jurisdiction. The plaintiff Thorne, for example, sought to bring an action for negligently misjudging examinations and sought an order of mandamus commanding the defendants 'to award him the grade at least justified'. In *Cox* v. *Green*[3] the defendant, a medical practitioner, had referred a complaint about the conduct of the plaintiff, also a medical practitioner, to the Central Ethical Committee of the British Medical Association. Before the Committee could consider the matter, the plaintiff issued a writ asking for a declaration, *inter alia*, that he had been acting in accordance with the ethical rules of the B.M.A. Plowman J. held that the endorsement on the writ disclosed no cause of action: in his words 'the question is purely whether the plaintiff . . . has been guilty of unethical conduct in a professional way, and that is a matter . . . for the appropriate medical tribunal, which is the Central Ethical Committee constituted under the Rules of the B.M.A.' It is also worth recalling the powers of discipline associated with schools, families and other institutions and recognized by the common law.

(ii) *It may be said that to pronounce on the merits would prejudice, prospectively or retrospectively, the political means of settlement*

This principle was applied in substance by the United States Supreme Court in the *Sabbatino*[4] case and was a part of the brief presented to the Court on behalf of the Department of State as *amicus curiae*. It has not been applied by an international tribunal although it may have had oblique relevance in two contexts. First, in the *Free Zones* case[5] in which the Permanent Court was equally divided on the propriety of making *ex aequo et bono* recommendations unless the parties had expressly authorized this course.[6] Secondly, in the *Northern Cameroons* case (Preliminary Objections)[7] in which the Court, in stating that the question before it was 'moot', placed emphasis on the fact that the Trusteeship had been irrevocably terminated by a resolution of the General Assembly of the United Nations.

[1] *The Times*, 20 May 1965. [2] [1966] 2 Q.B. 237. [3] [1966] 1 Ch. 216.

[4] *Banco Nacional de Cuba* v. *Sabbatino*, 84 Sup. Ct. 923 (1964); *International Law Reports*, vol. 35, p. 2. For comment see Henkin, *Columbia Law Review*, 64 (1964), p. 805; Falk, *The Role of Domestic Courts in the International Legal Order* (1964), *passim*; and Simmonds, *International and Comparative Law Quarterly* (1965), p. 452.

[5] *P.C.I.J.*, 1930, Series A, No. 24, p. 10.

[6] For comment see Lauterpacht, *The Development of International Law by the International Court* (1958), pp. 213–17.

[7] *I.C.J. Reports*, 1963, p. 15 at pp. 32–4. See also the Separate Opinions of Judge Wellington Koo at pp. 51–2, 54 et seq.; and of Judge Fitzmaurice at p. 110. For different views on the issue, see the Separate Opinion of Judge Morelli at pp. 133–7 and the Dissenting Opinions of Judge Badawi at pp. 152–3; of Judge Bustamante at pp. 168–9 and of Judge *ad hoc* Beb a Don at pp. 189–92. For comment: Gross, *American Journal of International Law*, 58 (1964), p. 415.

It may be noted that in the pleadings in the *Northern Cameroons* case the United Kingdom Counter-Memorial stated that the real dispute was between Cameroun and the General Assembly, and, further, that it was not intended in the scheme of the Charter of the United Nations that decisions of political organs—the General Assembly and the Trusteeship Council in the instant case—be subjected to judicial review at the instance of individual members of the United Nations.[1] The implications of this view cannot be explored fully here but it will suffice to point out that individual members fortunate enough to draw support from a majority in the respective political organ can engineer a request for an advisory opinion concerning interpretation of the Charter.[2] It is useful to recall that 50 per cent. of the members of the General Assembly voted in favour of the request in the *Certain Expenses* case whilst 32 per cent. abstained. This voting pattern probably reflected a division of opinion among members on the utility of a reference to the Court. In a general way, a large area of labour law in England, and especially the sphere of collective bargaining, has been left outside the purview of the courts. One explanation for this has been an acceptance by the courts and others that this standing aside by the common law courts was in accord with the best policy in the matter.[3]

(iii) *It may be said that no effective relief is sought*

In the *Northern Cameroons* case,[4] the Republic of Cameroun as applicant was concerned to raise an issue as to the interpretation of a Trusteeship Agreement which had been terminated before the proceedings reached judgment. The area in dispute had been ascribed to Nigeria by a resolution of the General Assembly. Since the applicant was not seeking reparation or a finding that would invalidate the union with Nigeria, the Court regarded the issue as 'remote from reality'. The Court held that as a matter of judicial propriety the jurisdiction which existed in the case should not be exercised. In the words of the judgment:[5]

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.

[1] *I.C.J. Pleadings, Case Concerning the Northern Cameroons*, pp. 59–63. See also the criticism of this view by Judge Bustamante in his Dissenting Opinion at pp. 176–80.

[2] See Rosenne, this *Year Book*, 39 (1963), p. 1 at pp. 5–6, 32–6, 42–4.

[3] Kahn-Freund, in Ginsburg (ed.), *Law and Opinion in England in the 20th Century* (1959), p. 215, in particular at pp. 232–44.

[4] *I.C.J. Reports*, 1963, p. 15.

[5] Ibid., pp. 33–4. See also the Separate Opinions of Judge Wellington Koo, at pp. 61–4; Judge Spender at p. 96; and Judge Fitzmaurice at pp. 97–100. Cf. *Germany* v. *Reparation Commission* (1926), *R.I.A.A.*, vol. 2, p. 873 at pp. 882–3.

This statement has its own interest but it is difficult to be convinced that the Court was correct in distinguishing other instances in which the Court had given a declaratory judgment in similar circumstances.[1] Moreover, Dr. Rosenne has commented that the assumption in the provisions of Chapter VI of the Charter is that the post-adjudicative phase is *not* a matter for the Court.[2]

A similar problem appeared in a different context in the *De Becker* case[3] before the European Court of Human Rights. In these proceedings the issue of substance was the compatibility of the Belgian Penal Code, Article 123 *sexies*, with the provisions of the European Convention on Human Rights. The first public hearing was held on 3 July 1961. On 30 June 1961, an Act of the Belgian Parliament amended Article 123 *sexies* of the Belgian Penal Code. Consequently the Belgian Agent contended at the first public hearing that by virtue of the temporary measures of the said Act, De Becker had achieved the purpose of his application and therefore had no interest in the proceedings arising from his application.[4] After the hearing of 5 October 1961, the applicant sent a memorandum to the delegates of the Commission according to which 'he now regards it as unnecessary further to proceed with the case and withdraws his application'.[5] On 22 January 1962, the Commission sent a memorandum to the Court entitled: 'Reconsideration by the Commission of its Conclusions, having regard to the Applicant's letter of October 5, 1961.' In this document the Commission stated, *inter alia*, that neither the general interests of European public order nor the particular interest of the individual in the present case required it to ask the Court to pronounce on the question whether or not De Becker was the victim of a violation of the Convention prior to the entry into force of the Act of 30 June 1961. In this same memorandum[6] the Commission took the view that, if the Court were not prepared to terminate the proceedings, then there were issues of interpretation of the Convention in relation to the Belgian law as amended which the Commission would wish to ask the Court to decide. At the public hearing of 19 February 1962, the Principal Delegate of the Commission took a very cautious view and submitted that it would be difficult to strike the case off the list if the Court had any doubts regarding the compatibility of the new Belgian law

[1] See the Separate Opinion of Judge Morelli (who considered that the claim was admissible but that there was a lack of jurisdiction) *I.C.J. Reports*, 1963, at pp. 131–41; and the Dissenting Opinions of Judge Badawi at pp. 150–3; Judge Bustamante at pp. 168–72, 180–2; and Judge *ad hoc* Beb a Don at pp. 193–6.

[2] *The Law and Practice of the International Court* (1965), p. 310, n. 1.

[3] *International Law Reports*, vol. 33, p. 205; 27 March 1962.

[4] The agent of the Belgian Government submitted further conclusions at the hearing of 5 October 1961.

[5] The Commission transmitted the text of the memorandum to the Court on 7 October 1961.

[6] *International Law Reports*, vol. 33, at p. 222.

with the Convention. The Court held, by six votes to one, that the case should be struck out of the list. With respect to the period before the change in Belgian law the Court was ready to allow the concordant requests of the Commission and the Belgian Government that the substance of the question be not examined. In relation to the period after the change in Belgian law the Court stated its conclusions as follows:[1]

. . . although an individual who has lodged an application with the Commission has no right to bring a case before the Court, no one should forget the origins of a case such as this one brought before the Court by the Commission which had been petitioned in pursuance of Article 25 of the Convention on foot of an allegation that the rights of an individual applicant were violated as a result of the application to him of legislative provisions in force in his country. The Court is not called upon, under Articles 19 and 25 of the Convention, to give a decision on an abstract problem relating to the compatibility of that Act with the provisions of the Convention, but on the specific case of the application of such an Act to the applicant and on the extent to which the latter would, as a result, be prevented from exercising one of the rights guaranteed by the Convention.

Therefore, were implementation of the new Belgian Act to raise problems of interpretation, it would not be incumbent upon the Court—since in the present instance striking the case off the list as requested by both the Belgian Government, as a Party to the case, and the Commission is not likely to prejudice the fundamental freedoms of the author of the original application—to give *ex officio* a decision on such problems.

In a substantial Dissenting Opinion[2] Judge Ross observed:

. . . when, as in these proceedings, a case is referred by the Commission to the Court, it is the duty of the Court to decide 'whether there has been a violation of the Convention'. This duty, arising directly out of the Convention, cannot be cancelled or modified by any step taken by the Commission or the State concerned but only in accordance with the Rules of the Court or generally accepted principles of the administration of justice construed in the light of the specific purpose of the Convention.

Later in the Opinion he poses the question whether a withdrawal of the application can reasonably allow the Court to terminate proceedings, especially when the withdrawal is due to the legal situation of the applicant being improved by new legislation which he declares to meet his application. His answer reads in part as follows:

This question could have been answered in the positive if the function of this Court had been to enforce private claims, which a claimant may, if he wishes, modify during proceedings. This is not, however, the case here. According to the Convention, the function of the Court is 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention' (Article 19 of the Convention). In view of this the Applicant is not recognised as a Party before the Court. His Application can only cause the Commission to make investigations; and, if the result of these investigations substantiates to a reasonable extent the complaint and a friendly

[1] *International Law Reports*, vol. 33, at p. 228. [2] Ibid.

settlement is not achieved, the Commission may bring the question for final decision before the Committee of Ministers or before the Court. When the proceedings have gone that far, the public interest requires that the question whether a violation has or has not taken place shall be decided regardless of whether the Applicant is or is not interested in the continuance of proceedings.

Of some relevance also in this connection is the Court of Appeal's decision in *Buck* v. *A.-G.*;[1] a case relating to the attainment of independence by Sierra Leone. Sierra Leone before independence consisted of a Crown Colony, to which the British Settlements Act, 1887, applied, and the Sierra Leone Protectorate, the hinterland of the colony, to which the Foreign Jurisdiction Act, 1890, applied. On 27 April 1961, by virtue of the Sierra Leone Independence Act passed on 28 March 1961, the colony and protectorate were combined in an independent State within the Commonwealth. The constitution of the new State was provided for by the Sierra Leone (Constitution) Order in Council made on 14 April 1961, and to come into operation immediately before the coming into effect of the Independence Act. The plaintiffs were citizens of Sierra Leone and British subjects, domiciled in the territory of the former colony, and they claimed to represent the descendants of settled freed slaves. They brought an action praying for declarations, and the essence of the prayer was that the Crown Colony still subsisted, as the Sierra Leone (Constitution) Order in Council, 1961, was *ultra vires* in so far as it applied, or purported to apply, to the colony. The *ultra vires* point rested on the effect of the British Settlements Act, 1887, as the exclusive basis for the powers vested in the Crown in relation to a settled colony. To found the jurisdiction of the Court to make the declarations sought, the plaintiffs pointed to the creation of the Constitution by an Order in Council which came into force separately from the Independence Act and for a moment of time before Sierra Leone became an independent sovereign State. The plaintiffs also contended that a declaration of invalidity would not be ineffective since by cutting off the powers of the putative Government of Sierra Leone at their source it would compel that Government, in practice, to take steps by legislation to rectify the position, which legislation could be opposed or influenced by the plaintiffs and their supporters. Before Wilberforce J. the plaintiffs failed on the basis that the contentions advanced lacked substance. The plaintiffs appealed and the appeal was dismissed primarily on the ground that the English courts had no jurisdiction to grant a declaration of the kind claimed. Harman L.J. stated his view on jurisdiction thus:[2]

> These courts cannot, in my view, make a declaration impugning the validity of the constitution of a foreign or independent State, at any rate where that is the object of the action. This may be put as a matter of international comity, as upon the ground of

[1] [1965] Ch. 745; noted in this *Year Book*, 41 (1965–6), p. 435. [2] [1965] Ch. 745, at 768.

effectiveness. No relief effective in this country or elsewhere is sought by the action. Any declaration which the court might make may be ignored with impunity by the independent country into whose affairs it pretends to pry, and I am of opinion that it would be not only improper, but contrary to law in those circumstances to make such a declaration as is here sought. Even if, however, I thought that we could, I should still think that we should not make such a declaration which would amount to an unwarrantable interference in the affairs of an independent member of the British Commonwealth.

Diplock[1] and Russell[2] L.JJ. placed emphasis on the matter of comity but the former observed:

But there is, I think, a technical answer also. As soon as Sierra Leone became independent, the Order in Council ceased to have any effect as an Order in Council, that is, as an exercise of the sovereign power of the United Kingdom Government represented by the Attorney-General of England. Whatever effect it then had was as part of the law of a foreign sovereign state, into the validity of which this court has no jurisdiction to inquire. Whether it was valid during the *punctum temporis* during which it was in force before Sierra Leone became independent is a subject-matter in which the parties have no interest. No legal rights or liabilities can depend upon it, except in so far as, the instant afterwards, it became part of the law of the independent sovereign state of Sierra Leone, into the validity of which we have no jurisdiction to inquire. The claim that the court has jurisdiction to make a declaration limited to the validity of the Order in Council, therefore, also fails on the ground that the parties at the time of suit have no interest in its subject-matter.

(iv) *It may be said that either the exercise of jurisdiction or the enforcement of any judgment which might be given would be* ultra vires *in terms of the relevant substantive law*

The case already referred to, *Buck* v. *A.-G.*, is also in point here since a major aspect of the Court's reasoning was the principle that the United Kingdom Government (and its judicial branch) 'does not purport to exercise jurisdiction over the internal affairs of any other independent State, or to apply measures of coercion to it or to its property, except in accordance with the rules of public international law'.[3] In *Harper* v. *Home Secretary*[4] the plaintiffs sought to obtain an injunction to restrain the Secretary of State from presenting to Her Majesty in Council a draft order on the redistribution of parliamentary seats which had already received the approval of both Houses of Parliament. As Lord Evershed, M.R., observed in the Court of Appeal,[5] the case came near to involving the privileges and powers of Parliament. He went on to examine the 'rules for redistribution of seats' in the second schedule to the House of Commons (Redistribution of Seats) Act, 1949, which rules were to govern the proceedings of the Boundary

[1] [1965] Ch. 745, at 770–2.
[2] Ibid., at 773–4.
[3] See Diplock L.J. at 770–1. See also Harman L.J. quoted above.
[4] [1955] 1 Ch. 238, C.A. See also *Merricks* v. *Heathcoat-Amory and the Minister of Agriculture, Fisheries and Food*, [1955] 1 Ch. 567, Roxburgh J. and cf. *Allen* v. *Thorn Electrical Industries*, *The Times*, 30 September 1966, Edmonton County Court (conveniently, in Wedderburn, *Cases and Materials on Labour Law* (1967), p. 46).
[5] [1955] 1 Ch. at 247.

Commission. The conclusion was that the Boundary Commission had not departed from the Rules. Lord Evershed, M.R., said:[1]

> I find it impossible to suppose that Parliament contemplated that, on any of these occasions when reports were presented, it would be competent for the court to determine and pronounce on whether a particular line which had commended itself to the Commission was one which the court thought was the best line or the right line—whether one thing rather than another was to be regarded as practicable and so on. If it were competent for the courts to pass judgments of that kind on the reports, I am at a loss to see where the process would end and what the function of Parliament would then turn out to be.

It is also relevant to refer to a principle of immunity stated by Lord Atkin in the *Arantzazu Mendi*:[2] 'The non-belligerent State which recognizes two Governments, one *de jure* and one *de facto*, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal courts.'

The matter of impossibility of *intra vires* enforcement impinges on the old problem of the reserved domain of domestic jurisdiction. Thus in the Hungarian Optants dispute[3] between Roumania and Hungary in 1927, Roumania refused to recognize the decision of a Mixed Arbitral Tribunal[4] on the ground that the tribunal had assumed jurisdiction in matters of a very wide compass in the domain of internal legislation and affecting Roumanian vital interests. The subject-matter of the dispute concerned the effects of large-scale agrarian reform in Roumania. In the *Linguistics* case[5] (Preliminary Objection) before the European Court of Human Rights part of the Belgian objection to the jurisdiction was summarized by the Court in its judgment as follows:[6]

> . . . it appears [that] in the view of the Belgian Government . . . the complaints referred to the Court are not covered by the Convention and Protocol but form part of the reserved domain of the Belgian legal order; that the linguistic and educational legislation is to a large extent an integral part of the State's political and social structure, which belongs pre-eminently to the reserved domain; that the Convention, as a declaration of rights, is not concerned with the organisation of governmental authorities; that the Belgian Conseil d'État and Parliament understood it in this way when the question of ratification arose; that the example of other European countries, for instance Switzerland, shows that language regulations are within the exclusive jurisdiction of States; that, therefore, there is in this case an inherent limit to the exercise

[1] Ibid., at 251.

[2] [1939] A.C. 256 at 265.

[3] *Agrarian Reform in Roumania and the case of the Hungarian Optants in Transylvania before the League of Nations*, Opinions by Alejandro Alvarez *et al.*, Paris, 1927 (these Opinions support the Roumanian position). See also Déak, *The Hungarian-Roumanian Land Dispute* (1928).

[4] *Emeric Kulin père à État roumain*, 10 January 1927. Printed in English translation, p. 3 of the first publication cited in the last note; also in *Recueil des décisions des tribunaux arbitraux mixtes* (1927), vol. 7, p. 138.

[5] Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' (Preliminary Objection), Judgment of 9 February 1967, *Publications of the European Court of Human Rights, Acts of the Court No. 6.*

[6] Ibid., judgment, p. 16.

of the Court's jurisdiction, this limit being so evident that it depends neither on an explicit clause of the Convention nor on a reservation under Article 64; . . .

In the event the Court held that the plea could not be regarded as possessing the character of a preliminary objection of incompetence since the case concerned the interpretation and application of the European Convention and its Protocol: in so far as the Belgian argument was relevant it could be raised as an argument as to the scope of the Convention when the merits were dealt with.[1] The background to the *Linguistics* case contains some striking features. Thus the issue is a facet of the relations between the two communities which compose the Belgian nation and these relations have in recent years reached a critical phase: after the judgment was delivered on the preliminary objection the schools issue caused the resignation of the Belgian Government. The decision itself supports a proposition which is hardly novel: that treaty obligations cannot be solely matters of domestic jurisdiction. Indeed, as a matter of merits and substantive law, few matters can be regarded *in limine* as within the reserved domain. However, compatible with this position, there probably remains a core concept which may be expressed as follows: a question is a matter of domestic jurisdiction if, *when the merits are examined*, it is apparent that reasonably effective implementation of a judgment in favour of the applicant would impose obligations corollary to the Convention *ex post facto* and not within the reasonable contemplation of the parties. Looked at in another way, the implementation of a judgment in such cases would be *ultra vires* the Convention and its institutional structure. The essence of the Belgian objection in the *Linguistics* case was the contention that action consequent on a judgment on the merits would involve constitutional changes of a magnitude outside the reasonable contemplation of parties to the Convention. Clearly a court must distinguish the question of reliance on domestic jurisdiction as a preliminary objection, a tactic to which courts are generally antipathetic, from the very difficult question of the possibility of *intra vires* implementation of a judgment on the merits in terms of the particular treaty obligations.

(v) *It may be said that the matters in issue are only capable of a political appreciation*

In a lengthy joint dissenting opinion in the *South-West Africa* cases (First Phase)[2] Judges Spender and Fitzmaurice referred to the obligation of the Mandatory State in Article 2 of the Mandate to 'promote to its utmost the material and moral well-being, and the social progress of the inhabitants of the territory . . .' and expressed a firm view that the apprecia-

[1] Ibid., pp. 18–19.

[2] *I.C.J. Reports*, 1962, p. 465 at pp. 466–7. See also Judge Spender in a Separate Opinion in the *Northern Cameroons* case (Preliminary Objections), ibid., 1963, at pp. 77–8.

tion and application of a provision of this kind is a matter for a 'technical or political forum'. The majority of the Court in the first phase took a different view and in both the first and second phases[1] the bulk of the judges on both sides of the division of opinion tended to stress other features of the issue. It may be recalled that municipal courts stressed a need for a non-legal appreciation of the matters at issue in *Thorne* v. *University of London*[2] (examination marking and grading), *Cox* v. *Green*[3] (ethical rules of the British Medical Association), and, less clearly, in *Harper* v. *Home Secretary*[4] (drawing of constituency boundaries).

(vi) *It may be said that an issue is non-justiciable because a necessary party is absent from the proceedings*

Non-justiciability in this instance rests on a principle of judicial fairness and also, in the case of an international tribunal, the principle that a court can only exercise jurisdiction with the consent of the State concerned. In the *Monetary Gold* case (Preliminary Objection)[5] the International Court, by a large majority, declined to exercise jurisdiction because the issues included a claim by Italy against Albania, a State absent from the proceedings. A complementary feature of judicial practice is the readiness of some tribunals in certain types of proceedings, as a matter of doing justice effectively, to ensure proper access to the views of parties directly interested, whether or not they are parties as a matter of procedure.[6]

(vii) *It may be said that there is a collateral reason for the application*

In the pleadings in the *Northern Cameroons* case (Preliminary Objections)[7] the United Kingdom gave emphasis to the point that the Republic of Cameroun was indirectly trying to challenge the validity of the plebiscite held under the aegis of the General Assembly. It is unlikely that a tribunal will be at all impressed by this type of argument concerning motivation.[8]

(viii) *It may be said that the tribunal is being asked to decide a purely hypothetical question of a factual nature*

The view of the Court in the *Northern Cameroons* case (Preliminary Objections)[9] may be thought to approximate to this objection in that the

[1] Ibid., 1966, p. 6. [2] Above. [3] Above. [4] Above.

[5] *I.C.J. Reports*, 1954, p. 19. See Lauterpacht, op. cit., pp. 102–3, 342–4.

[6] See the Advisory Opinion on *Judgments of the Administrative Tribunal of the I.L.O., I.C.J. Reports*, 1956, p. 77; and the *Lawless* case, *Yearbook of the European Convention* (1960), p. 516; (1961), p. 438. Cf. *Former Officials of the Governing Commission of the Saar Territory*, proposal to request an Advisory Opinion, discussed by Rosenne, *The Law and Practice of the International Court* (1965) pp. 736–7, and the *United Nations Administrative Tribunal* case, *I.C.J. Reports*, 1954, p. 47.

[7] *I.C.J. Pleadings, Case Concerning the Northern Cameroons*, pp. 261–5, 272, 281–4.

[8] See the *Admissions* Case, *I.C.J. Reports*, 1948, p. 61; Lauterpacht, op. cit., pp. 148–52; and Rosalyn Higgins, *International and Comparative Law Quarterly*, 17 (1968), at pp. 71–2.

[9] Above.

compliance of the plebiscite with the conditions set by the General Assembly was a question which was considered to be no longer of any practical significance.[1] A similar situation obtained in *Re Croydon Development Plans 1954 and 1959*,[2] in which the court held that there was no determinable issue as to whether planning permission might have been granted at a particular date since the property concerned had subsequently been the subject of a compulsory purchase order.

(ix) *It is a fact that in international relations the judicial function may be regarded as inapplicable to issues concerning the personality of parties to a dispute*

A considerable proportion of crises since 1945 have concerned secession and colonial wars. Since the very object of the initiative by the insurgent political body would be to create a new State, the use of a judicial forum would be invidious since the issue of *locus standi* would be equated with the substance of the dispute. Quite apart from the question of recognition and the status of advice from the executive, municipal courts are anxious to avoid having to face large issues of personality of international persons squarely.[3]

(x) *It may be said that it is impossible to exercise the judicial function because of the artificial and incomplete formulation of the issues with which the court is asked to deal*

Some of the dissenting judges in the *Expenses* case, in giving reasons for the view that the request for an advisory opinion should not have been acceded to, emphasized that the issues presented to the Court in the request were formulated in an inexact and artificial way.[4] A tribunal may leave open questions not dealt with adequately in the pleadings.[5] The International Court when concerned with contentious matters has accepted a channelling of issues in a *compromis* as in the *Corfu Channel* case (Merits)[6] and the *Minquiers and Ecrehos* case.[7]

(xi) *It may be said that in effect the tribunal is being asked to legislate*

In his Dissenting Opinion in the *Expenses* case Judge Moreno Quintana put this reason forward as a part of his thesis that the request for an advisory opinion should be declined. In his words:[8]

[1] See also Lauterpacht, op. cit., p. 79. [2] [1967] 2 A.E.R. 589, Pennycuick J.

[3] See *Buck* v. *A.-G.*, above, and, for the problems facing the Rhodesian courts since U.D.I., see Eekelaar, *Modern Law Review*, 30 (1967), p. 156, and the cases of *Madzimbamuto* v. *Lardner-Burke N.O. and Others* and *Baron* v. *Ayre N.O. and Others*, Rhodesian High Court, 9 September 1966. Hearing began on 22 May 1968; opinions were delivered on 23 July 1968.

[4] *I.C.J. Reports*, 1962, p. 151 at pp. 235–8 (Judge Basdevant), pp. 249–52 (Judge Moreno Quintana), and pp. 253–4 (Judge Koretsky). See also Lauterpacht, op. cit., pp. 206–9.

[5] See *Radio Corporation of America* v. *National Government of Republic of China*, *R.I.A.A.*, vol. 3, p. 1623 at pp. 1634–6. Cf. the *Nottebohm* case (Second Phase), *I.C.J. Reports*, 1955, p. 4.

[6] Ibid., 1949, p. 4. [7] Ibid., 1953, p. 47. [8] Ibid., 1962, p. 151 at pp. 250–1.

If the Court chose to deliver a reply of substance, it would have to pronounce on both the intrinsic and formal validity of the resolutions involved. That would amount to passing judgment on a politico-legal phenomenon by virtue of which the General Assembly, having in view the effectiveness of the pacifist system of the Charter, has in recent years substituted itself for the function assigned to the Security Council. Although Article 18 of the Charter lists the 'important questions' which are the subject of 'decisions' of the General Assembly, such decisions, when concerned with the question of the maintenance of international peace and security, merely assume the form of 'recommendations'; nor is there any international organ which, by its decisions approving recommendations, can alter their intrinsic character, which is non-obligatory. No type of action other than enforcement action for the maintenance of international peace and security, which is the exclusive prerogative of the Security Council, is provided for by the Charter as the function of any other organ. The Court might perhaps in that case accord an extra-legal, if not legal, character to the resolutions by which the General Assembly, faced with the paralysis of the Security Council, took over the function which the Charter allots to the latter body with a view to securing the primary purpose of the Organisation to maintain international peace and security. Such a process of adaptation of the original provisions of the Charter to the new circumstances of international life is in any case beyond the Court's scope of interpretation of the Charter. It would assume the exercise by that organ, by indirect means, of an activity *de lege ferenda* which is assigned to it neither by the Charter nor by its Statute.

In the *South-West Africa* cases (Second Phase)[1] the technical majority of the Court held that the Court could not engage in an essentially legislative task with respect to the *locus standi* required by the jurisdictional clause in the Mandate. It is interesting to note that several Judges in the majority in this case had been exponents of the teleological principle of interpretation in the *Expenses* case.[2]

It is perhaps convenient to notice an aspect of the judicial function which involves the exercise of considerable discretion, as does legislation and interpretation of treaties, namely, the application of rules to insufficiently established facts. Not infrequently in arbitral awards concerning boundaries certain points are established on the basis of evidence relating to manifestation of sovereignty or the position of parts of a line fixed by a boundary commission in the past.[3] However, the points established by orthodox means must sometimes be joined by lines based on a concept of 'natural lines' and, or, practical considerations.[4] In the *Fisheries*[5] case the

[1] Ibid., 1966, p. 6 at pp. 36, 47–8.

[2] Judges Spender, Fitzmaurice and Spiropoulos.

[3] See generally the *Award of Her Majesty Queen Elizabeth II for the Arbitration of a Controversy between the Argentine Republic and the Republic of Chile concerning certain parts of the Boundary between their Territories* (H.M.S.O., London, 1966).

[4] *Brazil-British Guiana Boundary* case (1904), *R.I.A.A.*, vol. 11, p. 21; *Western Boundary of Barotseland*, ibid., p. 67; *Boundary between Nicaragua and Honduras* (1906), ibid., at pp. 115–16; *Boundary between Bolivia and Peru* (1909), ibid., p. 141 at p. 145; *Island of Timor* (1914), ibid., p. 490 at p. 508, para. 10. But cf. *In re Labrador Boundary* (1927), 43 T.L.R. 289, P.C. at 290.

[5] *I.C.J. Reports*, 1951, p. 116; and see the Separate Opinion of Judge Hsu Mo, p. 154, and the Dissenting Opinion of Judge McNair, at p. 165.

Court had the considerable responsibility of evaluating the individual baselines created by Norway in 1935. Obviously courts are reluctant both to disclaim the existence of a wide discretion which the parties have implicitly conferred upon them in such cases and to qualify or avoid the exercise of such discretion on the ground that not enough is known of the relevant facts. Tribunals concerned to learn more of the facts may use experts in a manner which makes it more difficult to isolate the 'judicial' function.[1]

III. The Relations of the Category of Non-Justiciability

The catalogue of candidate arguments for non-justiciability has been completed but it would be incorrect to regard the list as exhaustive. Non-justiciability may hide behind a variety of categories and judicial tactics. Issues essentially of justiciability may be described as matters of propriety, of admissibility or of jurisdiction. An immunity[2] or privilege may be found to concern a policy of non-justiciability: in English law reference may be made to the problems relating to the prerogative,[3] contracts of service under the Crown and certain other types of agreement with the Crown.[4] Some relationships may remain non-justiciable simply because existing substantive law categories cannot cope. Thus in English law the classical contractual analysis does not apply very successfully to multilateral structures which determine the content of many contracts of employment involving the intervention of joint councils.[5] It is clear also that the subject-matter of this article overlaps with the problems of legal interest which were prominent in the *South-West Africa* cases in 1962 and 1966.[6] Another logically allied matter is the concept of a legal dispute. Without going into this question it may at least be said that in practice the International Court has tended to give a liberal application to the concept.[7] Finally, the discretion which the International Court has in deciding whether to accede to requests for advisory opinions is a matter which obviously permits of formulation in terms of justiciability; but it is by no means necessarily

[1] See White, *The Use of Experts by International Tribunals* (1965), pp. 126, 154–5, 172–3, 178–9.

[2] In *Buck* v. *A.-G.*, above, the Court of Appeal referred to the doctrine of sovereign immunity: see especially Diplock L.J., [1965] Ch. 745, at 770–2.

[3] See *Chandler* v. *D.P.P.*, [1964] A.C. 763, and the comment by Thompson, *Public Law* (1963), p. 201; and *Nissan* v. *A.-G.*, [1967] 3 W.L. R. 1044, C.A., and the comment by Collier, *Cambridge Law Journal*, 26 [1968], p. 102.

[4] *Per* Rowlatt J., in *Rederiaktiebolaget 'Amphitrite'* v. *The King*, [1921] 3 K.B. 500.

[5] See *Dudfield* v. *Ministry of Works*, *The Times*, 24 January 1964; Wedderburn, *Cases and Materials on Labour Law*, p. 296; *Faithful* v. *The Admiralty*, *The Times*, 24 January 1964; Wedderburn, p. 300.

[6] *I.C.J. Reports*, 1962, p. 319; ibid., 1966, p. 6.

[7] See the *Northern Cameroons* case (Preliminary Objections), ibid., 1963, p. 15 at p. 27; Judge Fitzmaurice, Separate Opinion, pp. 108–11; Judge Morelli, Separate Opinion, pp. 133–41. See further Rosenne, *The Law and Practice of the International Court* (1965), p. 518.

identical with justiciability since the factors influencing the exercise of the discretion are not confined to the usual principles and include special 'domestic' considerations, prominent among which is the Court's conception of its role as the principal judicial organ of the United Nations.

IV. Factors Militating in Favour of the Broadening of the Judicial Function

Thus far the emphasis has been on the exclusionary arguments and elements. It is necessary at this juncture to look at the other parts of the picture, at the evidence of factors making for a broadening of the judicial function.

(i) In municipal public law there has been a constant broadening of view as to what is a judicial function and as to the concepts of *locus standi* and legal interest. In the *South-West Africa* cases (Second Phase)[1] Judge Koretsky in a Dissenting Opinion drew a parallel with administrative law and the doctrine of *ultra vires*. The world of administrative law has propagated the idea that there is a duty to act judicially in a variety of contexts. In the United Kingdom it has recently been held that the Criminal Injuries Compensation Board is amenable to certiorari because it is a body having power to determine matters affecting subjects and a duty to act judicially.[2]

(ii) In international experience the appearance of the judicial function in the framework of a, formally speaking, non-judicial institution has increased: witness the complaints procedure of the European Commission of Human Rights, the work of bodies such as the United States–Italian Conciliation Commission, the commissions of inquiry of the I.L.O., decisions to permit waiver within the G.A.T.T. system, and the work of the International Frequency Registration Board.

(iii) Since the inception of the League of Nations, the concept of international supervision, the humanitarian counterpart of the district auditor in England and Wales, has become familiar. This development is described in the Dissenting Opinion of Judge Jessup in the *South-West Africa* cases (Second Phase),[3] with particular reference to the minorities treaties of the League period and the mandate and trusteeship systems. The concept of the general interest appears in multilateral treaties typified by the Genocide Convention.

(iv) The declaratory judgment has advanced both in international adjudication and in administrative law.

[1] *I.C.J. Reports*, 1966, at p. 243; and cf. Judge Jessup at pp. 385–8.

[2] *Reg.* v. *Criminal Injuries Compensation Board*, [1967] 2 Q.B. 864, D.C. But see Wade, *Administrative Law*, 2nd ed., p. 324. Cf. *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1967] 3 W.L.R. 382, especially at 412–13, *per* Diplock L.J.

[3] *I.C.J. Reports*, 1966, pp. 373 et seq.

(v) It has been demonstrated that economic issues may be justiciable. Thus the Court of Justice of the European Communities, in applying Article 37 of the European Coal and Steel Community Treaty, has the duty to decide whether 'fundamental and persistent' disturbances have occurred or may occur in the economy of a member State.[1]

(vi) Treaties may present political issues as justiciable matters. Thus the European Convention on Human Rights contains a proviso referring to 'time of war or other public emergency threatening the life of the nation' (Article 15, paragraph 1).[2] The obligations of the administering power in the mandate and trusteeship systems are essentially standards of political advancement: and they are none the less matters of law and legal appreciation in the same way as more familiar legal requirements as, for example, that premises should be 'fit for human habitation'. Of course the *Expenses* case concerned the legal framework of a major political crisis in the United Nations.[3]

(vii) In a variety of ways courts have been seen to fulfil a semi-political or legislative role. This may take the form of keynote decisions in areas of relative uncertainty, as in the *Reparation*,[4] *Reservations*[5] and *Fisheries*[6] cases. In applying principles courts may exercise a large measure of discretion.[7] All judicial systems resort to the principle of validation from time to time. The Federal Court of Pakistan upheld a quantity of *ultra vires* legislation on the basis of *salus populi suprema lex* in a *Special Reference* by the Governor-General in 1955;[8] and if one regards the teleological aspect of the *Expenses* Opinion as going beyond ordinary levels of implication then effectively the decision was an exercise in validation of expenditures incurred over a long period.[9]

V. Some Municipal Law Equivalents of Matters Justiciable in International Practice

The intention is to seek the equivalents in municipal law of certain matters commonly accepted as justiciable on the international plane.

(i) The physical boundaries of public law units, as opposed to areas of ownership, are not usually justiciable except, significantly, in the case of certain federations. The significance of the exception in the case of federa-

[1] *Niederreinische Bergwerks-Aktiengesellschaft* v. *The High Authority*, *International Law Reports*, vol. 32, p. 400. On the concept of a trade dispute in English courts, see *National Sailors' and Firemen's Union* v. *Reed*, [1926] 1 Ch. 536 and the discussion by Goodhart, *Yale Law Journal*, 36 (1927), p. 464 (also in *Essays in Jurisprudence and the Common Law*, Chap. XI).

[2] See also Art. 17. [3] See further Rosenne, this *Year Book*, 39 (1963), at pp. 36–8.

[4] *I.C.J. Reports*, 1949, p. 174. [5] Ibid., 1951, p. 15. [6] Ibid., p. 116. [7] See above.

[8] The case was *Federation of Pakistan* v. *Moulvi Tamizuddin Khan*, P.L.D. [1955] F.C. 435; and see Gledhill, *Pakistan: The Development of its Laws and Constitution* (1957), pp. 72–6.

[9] Cf. Judge Basdevant, Dissenting Opinion, *I.C.J. Reports*, 1962, at pp. 237–8.

tions lies in the political circumstance that federation is a half-way house between the unitary State and the association of fully independent States and thus some forms of the federal relation have affinities with forms of international relations. In ordinary circumstances in the municipal sphere public law issues concerning boundaries tend to be the prerogative of Parliament and legislation, as in *Harper* v. *Home Secretary*.[1] The *Labrador Boundary* case[2] is an apparent exception but this was a special reference to the Privy Council, an instance of internal consensual jurisdiction and, formally speaking, an advisory opinion. The issues in the *Fisheries* case,[3] and indeed in any case involving international limits, by contrast were before the International Court without trammel and involved the Court in extensive and free application of its judicial powers to an extensive and valuable subject-matter.

(ii) Legal personality in municipal law is a matter in which public power and the legislature take the initiative whilst the courts keep close to the statutes. English courts have been very cautious in approaching unincorporated associations. Executive influence may operate as, for example, by means of a Foreign Office certificate in cases involving recognition of foreign States and governments.[4] In contrast, the International Court has dealt, on its own terms for the most part, with large issues of personality and *vires* in the *Reparation* case,[5] the *U.N. Administrative Tribunal* case[6] and the *Expenses* case.[7]

(iii) Citizenship in municipal law is very much a matter for executive and legislature. Moreover, the connected question of diplomatic protection is a matter of discretion.[8] Money paid over by foreign governments in respect of harm to nationals is not recoverable as of right in the municipal law of the claiming State.[9] Yet the International Court had a decisive role in determining the incidence and consequences of diplomatic protection and nationality in the *Reparation*[10] case and the *Nottebohm* case (Second Phase).[11]

(iv) In municipal law contexts, a court facing a decision on an important matter may discover an executive or legislature prepared to insure against the Court taking a politically or otherwise inconvenient stand on the issue concerned. The incidence of guilt or liability may be prevented by acts of

[1] Above. [2] (1927), 43 T.L.R. 289. [3] *I.C.J. Reports*, 1951, p. 116.

[4] See *Carl Zeiss Stiftung* v. *Rayner and Keeler, Ltd.* (No. 2), [1967] 1 A.C. 853. Cf. the situation of the Rhodesian courts in the period since the Unilateral Declaration of Independence.

[5] *I.C.J. Reports*, 1949, p. 174. [6] Ibid., 1954, p. 47. [7] Ibid., 1962, p. 151.

[8] *China Navigation Co. Ltd.* v. *A.-G.*, [1932] 2 K.B. 197, C.A.

[9] This is the position in the United Kingdom, the United States and Switzerland: see respectively *Civilian War Claimants Association* v. *The King*, [1932] A.C. 14; *Blabon* v. *United States*, 173 F. Supp. 799 (Ct. Cl. 1959), *International Law Reports*, vol. 28, p. 195; and Drucker, *International and Comparative Law Quarterly*, 16 (1967), p. 1157.

[10] Above. [11] *I.C.J. Reports*, 1955, p. 4.

indemnity or mitigated by pardon, remission of sentence and so on. The incidence of innocence may be prevented by a regime of preventive detention. Certain legal issues may be determined for the Court externally as by the Foreign Office certificate. Particular decisions may be reversed by legislation like the War Damage Act, 1965.[1] *Ultra vires* acts may be validated retrospectively[2] or prospectively[3] by legislation.

Bearing these comparisons in mind, it becomes apparent that in international law it is much more difficult, once a court has exercised jurisdiction over the merits, to undo the effects of a decision except by the exceptional and disreputable method of disregarding it. There is on the international plane no correspondingly draconic prerogative or legislative power to expunge judicial decisions. Lauterpacht, in a passage in *The Function of Law in the International Community*,[4] states that the extensive impact of decisions on the merits makes States prone to raise jurisdictional objections and to general caution. It is difficult to put this type of proposition to proof but it is at the least a reasonable supposition.

All this having been said, there remains a family of questions on the international plane concerning the problem of coping with the consequences of decisions of tribunals which cannot be circumvented by simple or direct constitutional action. Decisions may be circumvented by the long-term operation of law-making processes, of course: thus juristic opinion and multilateral conventions have flowed around and beyond the decision in *The Lotus* case.[5] Advisory opinions may be 'ignored' but even the process of ultimate inaction may include a substantial amount of political and legal discussion in which a course of action based upon the advisory opinion remains a serious option.[6] Moreover, the process of 'observing' an advisory opinion involves a choice of appropriate action and the taking of decisions on matters not spelled out or dealt with at all decisively in the advisory opinion. In the *U.N. Administrative Tribunal* case[7] the Court in its Advisory Opinion held that the General Assembly was bound to honour its obligations arising from awards of compensation made by the Administrative Tribunal in favour of staff members. Hersch Lauterpacht refers to the unusual situation obtaining in the United Nations structure in the following passage:[8]

[1] The decision affected was *Burmah Oil Co. Ltd.* v. *Lord Advocate*, [1965] A.C. 75.

[2] See the Order in Council at issue in *Sabally and N'Jie* v. *H.M. A.-G.*, [1965] 1 Q.B. 273, C.A.

[3] See *Prescott* v. *Birmingham Corporation*, [1955] Ch. 210, C.A. and Wade, *Administrative Law*, 2nd ed., pp. 69–70.

[4] At. p. 207.

[5] *P.C.I.J.*, 1927, Series A, No. 10.

[6] The critical consequences of the *Expenses* Opinion may be cited. On the effects of advisory opinions, see Rosenne, this *Year Book*, 39 (1963), pp. 2, 239–44.

[7] *I.C.J. Reports*, 1954, p. 47.

[8] *The Development of International Law by the International Court*, p. 326. And see further, ibid., pp. 326–7.

The implications of the Opinion . . . in relation to [the sovereignty of the General Assembly of the United Nations] are far-reaching. While, obviously, the General Assembly is neither the sovereign nor the legislative organ of the international community, it is the common and probably the highest organ of the sovereign States organised in the United Nations. It is, in a distinct sense, the repository of such ultimate authority as there exists in organised international society. The Opinion of the Court affirms that that ultimate authority is itself bound by law—in the particular case by the law laid down by a judicial tribunal created by it; such sovereignty as that ultimate authority possesses is limited by law. Possibly there was an element of simplification in the observation of the Court that 'it is common practice in national legislatures to create courts with the capacity to render decisions legally binding on the legislatures which brought them into being.'[1] For, normally, there is no limit to the power of the sovereign legislature to alter existing legal rights—whether established by statute or judicial decision—although in some countries such power may be limited by virtue of the provisions of the Constitution safeguarded by the power of courts to declare unconstitutional legislation inconsistent with the Constitution.

That these issues are far from being academic is further illustrated by the Advisory Opinion concerning the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization.*[2] The Opinion produced a finding that the I.M.C.O. Assembly had acted unconstitutionally in the election to the Safety Committee in 1959. The Assembly of I.M.C.O. was faced with substantial legal and practical problems in deciding how to act upon the Advisory Opinion.[3] An international organ faced with the debris of *ultra vires* action may find it less easy to produce the equivalent of validating legislation than would a national legislature.

VI. Conclusions

Granting the value of Lauterpacht's positions in *The Function of Law in the International Community*, there are still many issues relating to justiciability which need examination. There are certain persistent problems as to the limitations and possibilities of the judicial function, and their solution is not aided by facile assumptions about the role of courts nationally or internationally. In spite of the special features of State relations, and when jurisdiction does exist, justiciability on the international scene is quite far-reaching. Comparable areas in municipal law are often either non-justiciable or justiciable in principle but subject to political and legislative revision. Indeed the reasonable supposition is that the normative irrevocability of decisions of international tribunals may cause States to be reserved toward adjudication and, further, it should be said that the practical consequences of the irrevocability should be given more notice.[4]

[1] *I.C.J. Reports*, 1954, p. 61. [2] Ibid., 1960, p. 23.

[3] The episode is examined from this point of view by Elihu Lauterpacht, in *Cambridge Essays in International Law*, at pp. 100–6.

[4] Cf. the *U.N. Administrative Tribunal* case, above.

It follows that it is hardly logical to draw conclusions as to the viability of international law by emphasizing the issue of jurisdictional poverty without substantial analysis of the problems of justiciability and revocability of decision in the municipal sphere. All too commonly the municipal sphere, in idealized form, is taken as the measure of international law and settlement of disputes between States.[1]

It is not possible to isolate any single principle of justiciability and an attempt to do so might produce a new harvest of unsound legal folklore. There are certainly cases of functional non-justiciability, for example, where the parties have not properly presented the issues to the court; and yet even here there are numerous instances of tribunals, both municipal and international, being prepared to deal with the relevant issues whether or not the parties had pleaded or argued the issues accordingly. Ultimately justiciability is a matter of policy and this may be measured, but is not necessarily limited, by the standard assumptions of the legal persons most closely affected.

Quite apart from justiciability as such, various functional similarities between municipal and international law may be discovered, more especially in the important spheres beyond private litigation. In labour law and the law relating to public service much emphasis is placed on conciliation and arbitration. Collective bargaining in the United Kingdom has lasting significance as the basis of multilateral agreements which in law may fail to qualify as contracts (*a*) because the classical contract analysis breaks down; and, or (*b*) because of the uncertain status of contracts of service under the Crown. It is probably the case that more progress is to be made in the field of international law, in terms of knowing what to expect from the law and how to make best use of it, by learning from public and especially administrative law techniques and moving from the narrow view that the important area of action is the contentious proceeding. In any case, the scheme of the United Nations Charter gives emphasis to the role of the political organs in settlement of disputes, and contentious proceedings before the judicial organ are not closely or compulsorily related to the other machinery of settlement.[2] Many issues are not entirely suited to settlement on the *in personam* basis of contentious proceedings. Territorial settlement, more especially for populated areas, raises the issue of status, and not merely whether the area 'belongs' to A or B. In such a case, the narrow view of *locus standi* and legal interest can create barriers even when contentious procedure is employed to ensure supervision of a territory not under national sovereignty.[3] More toleration of actions for a declaration

[1] This is a feature even of the relatively undogmatic treatment by Hart, *The Concept of Law* (1961); see in particular Chapter X.

[2] See Rosenne, this *Year Book*, 39 (1963), at pp. 4–5.

[3] Cf. *South-West Africa* cases (Second Phase), *I.C.J. Reports*, 1966, p. 6.

should be shown and States should be given more opportunity of raising *ultra vires* issues.[1] In general, the fortuitous element in the raising of issues of *ultra vires* should be reduced: the value of the Advisory Opinion in the *Expenses* case would seem to have been adversely affected by the circumstances in which the issue came to be placed before the Court.[2]

[1] See the Agreement on Arbitration supplementary to the Agreement establishing Interim Arrangements for a Global Commercial Communications Satellite System, *U.N. Treaty Series* (1967), No. 71, Cmnd. 3375.

[2] See above and cf. the Dissenting Opinion of Judge Ross in the *De Becker* case, above.

INTERNATIONAL CORPORATIONS AND NATIONAL LAW*

By F. A. MANN[1]

I

THE term 'international company' may have at least three different meanings.

1. A company which, plainly, is a national company may have an international business and may, for this reason, conveniently be referred to as an international company.

This may occur in the case of General Motors, or Shell, simply because these companies do export business, have foreign agents, branches, subsidiaries or are contractually committed to the sharing of profits with foreign companies, as happens, for instance, in the case of Shell and Royal Dutch. In these cases the description 'international company' is a misnomer: it is due to a confusion between an international company and an international business. Shell is an English company, Royal Dutch is a Dutch company. This would be so even if, as a result of the unification or harmonization of company law, the English and Dutch company law should become identical. The fact that in two or more countries the law is the same does not render the corporation formed under such unified law an international one. The English Companies Act has been adopted in many countries. Yet a company incorporated in a particular country under a law which is common to other countries belongs to that country and none other.

2. There are companies created under national law, but described as international, because their formation is agreed, or at least contemplated, in a treaty concluded by States. Such companies owe their conception, though not their birth, to treaties concluded between States and in law are national in character.

Two clear examples come from Commonwealth practice. On 4 August 1947[2] the United Kingdom, Australia and New Zealand entered into a treaty providing for the formation of British Commonwealth Airlines Ltd. as a jointly-owned Australian company operating Trans-Pacific Air Services.

* © Dr. F. A. Mann, 1968.

[1] LL.D. (Lond.), Dr. Jur. (Berlin); Honorary Professor, University of Bonn; Solicitor, London.

[2] *United Nations Treaty Series*, vol. 28, p. 41; ibid., vol. 53, p. 241; Professor Paul de Visscher, *Recueil des cours*, 102 (1961–I), p. 494, expresses unjustifiable doubt as to the Australian nationality of the company mentioned in the text.

Similarly, on 15 September 1949[1] the same three Governments entered into a treaty according to which Tasman Empire Airways Ltd. was to operate Air Services across the Tasman sea between Australia and New Zealand. Notwithstanding their origin, these are clearly national companies and the treaty has now no other significance than that it may, in remote circumstances, throw light on the interpretation of the Articles of Association.

Perhaps the most interesting example of this type of corporation is the company which is referred to in Article 84 of the treaty concluded between France and Germany on 27 October 1956[2] and which is concerned with co-ordinating sales of coal produced in the Saar and in Lorraine. It is known as Saarlor and is, it appears, registered with identical Articles of Association both in France and in Germany, with seats in both centres, but (*si venia sit verbo*) 'split down the middle' in that, as a result of the treaty provisions, the company is to be treated as two companies, one in each of the two countries, 'as if each of the two seats owned the moiety of the capital, the assets, the liabilities and the reserves of the company and the moiety of the turnover and of the profits, and distributed the moiety of its dividends and other payments to shareholders'.[3] On proper legal analysis there would appear to exist two companies with different seats and nationalities, but with identical Articles and tied to each other by the provisions of the treaty requiring complete equalization between them.[4] This can be achieved by contract (as it has been achieved in the case of Royal Dutch-Shell or in the case of Unilever N.V. and Unilever Ltd.) and there is, therefore, nothing remarkable in Saarlor's legal structure. The French-German treaty, it is true, contains some detailed provisions which have been incorporated into French and German law and, therefore, have much stronger force than purely contractual arrangements. But, subject to this point, the legal structure of Saarlor does not fundamentally differ from that of well-known national companies operating internationally.

[1] *United Nations Treaty Series*, vol. 53, p. 235.

[2] For text, see *Bundesgesetzblatt* (1956–II), pp. 1634, 1791.

[3] Art. 84, paragraph 6.

[4] In this sense the helpful contribution by Professor Bärmann, 'Supranationale Aktiengesellschaften', *Archiv für die zivilistische Praxis* (1957), p. 156, particularly pp. 167 et seq., 211 (double seat, double nationality), pp. 170–1 (the *jus cogens* of each country must be observed). Beitzke, *Mitteilungen der Deutschen Gesellschaft für Völkerrecht*, 9 (1968) p. 77, says correctly that 'the company' has French nationality in France and German nationality in Germany, but proceeds to reject the view that there exist two corporations, and suggests that there exist 'only two legal bodies which relate to the same substratum and do not destroy the unity of the legal person'. Seidl-Hohenveldern, *Das Recht der Internationalen Organisationen* (1967), No. 338 seems to agree with the text, but is not entirely clear. It may be explained here that the German word 'Rechtsfähigkeit' has no precise equivalent in the English language. It indicates the existence of a person, as opposed to the capacity to act which the existing person enjoys. Jenks, *English Civil Law* (4th ed., 1947), vol. 1, p. 1, clearly sees the point and suggests that 'legal capacity' covers both aspects, viz. what he calls passive and active personality. Such terminology is cumbersome and misleading. In the above quotation the word 'legal bodies' was used, but in future the word personality will usually be employed to indicate what Jenks understands by passive capacity.

Much more difficult questions arise in the case of certain companies which, in pursuance of a treaty and adopting the Articles of Association laid down in the treaty, were recently formed in Switzerland, Germany and Belgium respectively under Swiss, German and Belgian law,[1] but subject to a provision in the treaty of the following type:[2]

> The Company shall be governed by the present Convention, by the Statute and, residuarily, by the law of the State in which its Headquarters are situated, in so far as the present Convention or the Statute do not derogate therefrom.

It is submitted, though not without diffidence, that such a company is a national rather than an international corporation.[3] Though the company is primarily subject to the Convention, though its Statutes cannot be freely amended and though it is in many respects immune from control by the local sovereign,[4] it is his law that brings the company into existence and retains some measure of authority and supervision over it. Thus a change of the local company law in fields not covered by the Convention or the Statute would have its effect upon the company. In such circumstances it does not seem possible to suggest that the company is so completely outside any municipal law as to be a truly international corporation.[5]

Contrariwise, Switzerland does not enjoy any power of regulation in respect of the Bank for International Settlements and in its case it is, therefore, very arguable that it should be treated as an international corporation. The provision of fundamental importance is contained in Article 1 of the International Convention respecting the Bank for International Settlements signed at The Hague on 20 January 1930 between

[1] Treaty between Germany, Austria, Belgium, Denmark, Spain, France, Italy, Luxembourg, Norway, Netherlands, Portugal, Sweden, Yugoslavia relating to 'Eurofima' (European Company for Financing Railway Material), 20 October 1955, *Bundesgesetzblatt* (1956–II), p. 907; Treaty between France and Germany relating to Navigation on the Moselle, 22 December 1956, ibid., p. 1837; Convention on the Constitution of a European Company for the Chemical Processing of Irradiated Fuels (Eurochemic), 20 December 1957, ibid. (1959–II), p. 621.

[2] Art. 2 of the last-mentioned treaty.

[3] In the same sense Beitzke, loc. cit. (above, p. 146, n. 4), p. 91. Hahn, 'International and Supranational Public Authorities', *Law and Contemporary Problems*, 26 (1961), pp. 651, 653, 657; Scheuner, *Jahrbuch* (1966) (Ministerpräsident des Landes Nordrhein-Westfalen, Landesamt für Forschung), p. 576, but see also p. 580; Sereni, *Recueil des cours*, 96 (1959–I), pp. 171–2, and perhaps also Friedmann, *The Changing Structure of International Law* (1964), p. 183, though his reasoning is far from clear; he describes Eurofima as a Swiss company governed by Swiss law, yet as 'essentially an international company' and says of Eurochemic that it 'goes one step further than Eurofima in the direction of a genuinely international company'. See also Seidl-Hohenveldern, op. cit. (above, p. 146, n. 4), Nos. 339–41, who seems to attribute to the corporations mentioned in the text a mixed national and international character. For a different view see Paul de Visscher, loc. cit. (above, p. 145, n. 2), p. 497.

[4] On immunity see Arts. 7 and 8 and on the amendment see Arts. 14 and 15 of the last of the treaties mentioned in n. 1 on this page.

[5] For a case in which it was doubtful whether a corporation was Albanian or Italian, see the remarks on the status of the National Bank of Albania in Professor Sauser-Hall's award in the case of *Gold looted by Germany from Rome in 1943*, I.L.R. (1953), p. 441, at pp. 446 et seq.

Germany, Belgium, France, the United Kingdom, Italy, Japan and Switzerland:[1]

> Switzerland undertakes to grant to the Bank for International Settlements, without delay, the following constituent charter having force of law: not to abrogate this charter, not to amend or add to it, and not to sanction amendments to the Statutes of the Bank referred to in paragraph 4 of the charter otherwise than in agreement with the other signatory Governments.

Moreover, by virtue of the charter the Bank's 'constitution, operations and activities are defined and governed by the annexed Statutes' which are declared to 'be valid and operative notwithstanding any inconsistency therewith in the provisions of any present or future Swiss law'. Although the Bank has been treated as subject to the jurisdiction of the Swiss courts,[2] it is immune from Swiss legislation. Accordingly, much can be urged in support of the conclusion that in substance Switzerland has no control over the Bank, its status or operations at all. If this is correct, the Bank would appear to be an international corporation.[3]

3. The third category comprises those corporations which are not only contemplated, but also created by the treaty itself, which are organized and live under public international law alone, which are international persons and which, in regard to their status, owe nothing to any national system of law, however much they may participate in activities proceeding under national law. One of the most important and earliest examples is the International Bank for Reconstruction and Development.[4] It was created in Bretton Woods by Articles of Agreement which are not so very different from Articles of Association of a private company as these are generally known. It is an institution which has offices in Washington, yet is completely free of the law of the United States of America. It is an international person which the United States allows to operate in its territory and which, in

[1] Cmd. 3766.

[2] BGE 62 II 140. The problem of immunity from jurisdiction was, surprisingly, not raised in this case. That problem is nowhere referred to in any of the constituent texts. If the Bank were entitled to immunity the very serious consequence would have to be faced that it could not be sued anywhere. Such a result cannot readily be accepted. Nor is the submission of the Bank to the jurisdiction of the Swiss courts irreconcilable with its status as an international corporation.

[3] This is the conclusion of Seidl-Hohenveldern, op. cit. (above, p. 146, n. 4), No. 337, and Paul de Visscher, loc. cit. (above, p. 145, n. 2), p. 500, but the majority of writers regard the Bank as a Swiss corporation; Beitzke, *Die Rechtsstellung der Bank für Internationalen Zahlungsausgleich* (1932), and in his recent paper (above, 146 p., n. 4), p. 82; Gutzwiller, *Mitteilungen der Deutschen Gesellschaft für Völkerrecht* (1933), p. 116, at pp. 175–6, who refers to Switzerland's official view in the same sense, but treats the point as problematical; Sereni, *Recueil des cours*, 96 (1959–I), p. 159; Hudson, *American Journal of International Law* (1930), p. 561; Schwarzenberger, *Die Internationalen Banken* (1932), pp. 15 et seq.; Martin Wolff, *Internationales Privatrecht* (3rd ed., 1954), p. 121, n. 29. Mann, this *Year Book*, 21 (1944), p. 16, followed the latter view.

[4] Cmd. 6546. On the Bank see, for instance, Broches, *Recueil des cours*, 98 (1964–III), p. 301 whose observations on the Bank's status (pp. 323–8) labour an obvious point.

fact, operates on the level of both international and national law. Thus it enters into treaties with States and also into contracts with the printers who print its stationery. The number of such truly international corporations of a commercial or quasi-commercial character is rapidly increasing, particularly in the field of banking. The International Finance Corporation,[1] created in 1955, was followed in 1959 by the Inter-American Development Bank,[2] in 1960 by the European Investment Bank,[3] in 1963 by the International Bank for Economic Cooperation formed by the Soviet bloc,[4] in 1965 by the Asian Development Bank,[5] and in 1967 by the East African Development Bank.[6]

These institutions are in law not fundamentally different from those numerous international organizations which, in the course of the last few decades have taken control of so large a field of world affairs and attracted much attention from legal scholars. Yet they not only show a peculiar affinity to companies in municipal law, but also participate perhaps more than other international organizations in international commercial life on the national level. And it must be expected that their numbers and the scope of their activities will increase. Accordingly, it does not seem inappropriate to single them out for special study in considering their status in municipal law.

II

It is of the essence of an international corporation that it is created, and lives, under public international law. Accordingly, as in the case of international organizations in general, the constituent treaty, analogies derived from other treaties and from municipal law, international decisions and whatever other sources make up the body of international law as a whole govern its status, its relations *inter se*, its corporate structure, its activities on the plane of international law.[7] No problem of the conflict of laws normally confronts an international tribunal, just as a French Court considering a French company in France is relieved of any conflict problem.[8]

On the one hand, this does not mean that an international corporation is subject to international law in the same sense and to the same extent as a State; to hold an organization to be an international person 'is not the same

[1] Cmd. 9502.
[2] *United Nations Treaty Series*, vol. 389, p. 69.
[3] Ibid., vol. 289, p. 120.
[4] *International Legal Materials*, 3 (1964), p. 324.
[5] Ibid., 5 (1966), p. 262 (and see p. 292).
[6] Ibid., 6 (1967), p. 932, particularly p. 1003.

[7] Finn Seyersted, *Objective International Personality of International Organisations* (Copenhagen, 1963), has developed a theory of 'objective international personality' (a phrase used by the International Court of Justice in the case mentioned below, p. 150, n. 1). Such personality is said to be independent of the treaties establishing the international organization. This is unconvincing. Does it not depend upon the acts and intentions of the parties whether they create a limited company or a limited partnership?

[8] A different view seems to be taken by Dr. Jenks, *The Proper Law of International Organisations* (1962), pp. 13–17, but it is difficult to visualize the practical cases he has in mind.

thing as saying that it is a State which it certainly is not, or that its legal personality and rights and duties are the same as those of a State'.[1] Thus, while an international corporation may well be able to enter into some treaties, it does not follow that it could conclude all kinds of treaties and that the law of treaties applicable to it is necessarily the same as that applicable to States; hence the International Law Commission was wise, contrary to earlier plans, to limit its draft of a Law of Treaties to treaties concluded by States.[2] Or there is the question of responsibility; it is not certain that the rules of State responsibility which have been developed in regard to States can indiscriminately be applied to international organizations in general or international corporations in particular.[3]

On the other hand, the international corporation's dependence upon and submission to public international law does mean that it exists entirely outside the realm of municipal law. No doubt, like the State it may and, indeed, it must enter into contracts governed by municipal law; moreover, rules of municipal law may provide an analogy and lead to the acceptance of a general principle recognized by civilized nations. Those rules may thus throw light upon the structure of the corporation, the interpretation of its constitution or the validity of its acts. Yet municipal law as such, the law of any single State, is without direct relevance to the elucidation of an international corporation's legal position, for, in Dr. Clive Parry's striking phrase, an international corporation 'is everywhere abroad and nowhere at home.'[4] This involves two consequences.

In the first place, an international corporation cannot have a nationality.[5] It is, by nature and definition, an international, not a national, person. Thus, if a treaty benefits the nationals of a certain State, an international person is excluded from its operation even in case the constitution of the corporation adopts and embodies, by way of reference, the company law of the State in question.[6] This is quite different in the case of a State, for a State is, or may be, its own most prominent national. Even where the wording of the treaty or statute covers all those States which happen to be member States of the international corporation, the latter would not, in

[1] *Reparations for Injuries Suffered in the Service of the United Nations, I.C.J. Reports*, 1949, p. 174 at pp. 178–9.

[2] See the Commission's Comment on Art. 1, *American Journal of International Law* (1967), p. 286.

[3] The problem has been much neglected and is in need of thorough investigation.

[4] In Friedmann (ed.), *The Public Corporation* (1954), p. 514.

[5] In the same sense Jenks, op. cit. (above, p. 149, n. 7), pp. 1, 12. Cf. *Balfour Guthrie & Co. Ltd.* v. *United States*, 90 F. Supp. 831 (1950), also I.L.R. (1950), p. 323: 'International organisations, such as the United Nations and its agencies, of which the United States is a member, are not alien bodies.'

[6] This is conceivable, but has not yet occurred. If it did occur it would be a case of 'incorporation' or *materiellrechtliche Verweisung* such as the conflict of laws knows well. See, generally, Jenks, op. cit., pp. 7–8.

the absence of a special context, permitting an interpretation in the opposite sense, be caught, for it is different from its constituent members. Accordingly, if a treaty applied to the nationals of all States in the Americas, the Inter-American Development Bank would, probably, not be included. Nor is a member State bound to treat an international corporation as if it were its own national. The corporation does not possess the nationality of any State and there is no necessity and, indeed, no room for any fiction, though the opposite view is supported by the high authority of Professor Martin Wolff.[1] The consequences of the preceding submission are likely to be particularly serious in the field of copyright where nationality of one of the member States of the Universal Copyright Convention is one of the conditions of protection. It may be a matter for regret that the revised Convention signed in Stockholm in 1967 again seems to have failed to take care of the point.

Secondly, an international corporation does not have, in law, its seat, domicile or residence in a particular State so as to be within its territory in any legally relevant sense:[2] The United Nations Organization is not a resident of New York. The Inter-American Development Bank does not have its seat or domicile in Washington, D.C. According to the latter's constitution[3] 'the principal office of the Bank shall be located in Washington', but this does not subject the Bank to the territorial sovereignty or control of the United States of America;[4] the banking laws of the District of Columbia do not reach it. It follows that it is impossible to suggest that the law of the country in which the corporation has its seat is either primarily or subsidiarily applicable to it. Thus if a treaty or statute refers to residents of the United States of America it does not contemplate an international corporation such as the Inter-American Development Bank. It follows also that, in the eyes of English common or statutory law, an international organization established in a certain State cannot, for instance, be an 'enemy' of Britain even though the State in question and all persons, physical and legal, resident in it are enemies. An international corporation is bound to operate in the territory of a sovereign and it needs the consent of the local sovereign, which is usually given by the so-called Headquarters Agreement. Factually, it may well be said to be resident at its principal office. Yet in law it is and operates outside the confines of any State. In certain circumstances obvious dangers may flow from the absence of

[1] *Internationales Privatrecht* (3rd. ed., 1953), p. 121; in the same sense probably Beitzke on whom see below pp. 156–7. Cf. Gutzwiller, op. cit. (above, p. 148, n. 3), p. 166. The idea that an international corporation has as many nationalities as there are members would seem to be totally unrealistic and unacceptable.

[2] Probably Jenks, op. cit. (above, p. 149, n. 7), pp. 1, 12, agrees.

[3] Art. XIV, Section 1.

[4] It has, of course, been granted the numerous immunities which have become almost standard practice; Art. XI, Sections 3–10.

any territorial residence in the legal sense of the term, but this cannot jeopardize the principle.

Here, as elsewhere, the remedy lies in remembering that an international corporation does not exist except in the eyes of such States as have granted recognition to, and not withdrawn recognition from, it.[1] Recognition may, of course, be granted expressly or impliedly. The most impressive manner of granting it is for the State to become a member. An equally clear method is the grant of immunities[2] or the conclusion of a treaty, while other contractual arrangements do not necessarily involve the recognition of the existence of an international person. In any case, recognition is a matter for the Executive and does not require legislation.[3] The requirement of recognition has not always received that emphasis which it deserves. In particular, one must not be misled by the very special case of the United Nations Organization which, as the International Court of Justice decided, has capacity to bring an international claim even against a non-member State on the ground 'that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognised by them alone, together with capacity to bring international claims'.[4] It may be that, exceptionally, a similar rule can be applied to such a corporation as the International Bank for Reconstruction and Development, a world organization comprising well over a hundred member States. But if in other instances of much more limited scope recognition were dispensed with, it would mean that a few States, perhaps even unrecognized States, could set up an international corporation and transfer certain functions to it, with the result not only that the rest of the family of nations would have to recognize the corporation, but also that the constituent member States might make it difficult, if not impossible, to hold anyone other than the corporation with its limited resources responsible for damages flowing from the exercise of the transferred functions. Questions of this type need careful consideration before any State which refuses to grant recognition should be bound to accept the international personality of a corporate

[1] The necessity for the recognition of an international person is emphasized by few writers: Schwarzenberger, *International Law* (1957), vol. 1, p. 129; Bindschedler, *Archiv für Völkerrecht* 9 (1961–2), pp. 387–8; also in Strupp-Schlochauer, *Wörterbuch des Völkerrechts*, vol. 2, p. 79; Mosler, *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht*, 22 (1962), p. 32; Seidl-Hohenveldern, op. cit. (above, p. 146, n. 4), Nos. 701–14; Hahn, *Harvard Law Review*, 71 (1958), p. 1048. Against the necessity for recognition, see Sorensen, *Recueil des cours*, 101 (1960–III), pp. 137–9, and Seyersted, op. cit. (above, p. 149, n. 6).

[2] In some countries the Executive has power to grant immunity to international bodies, even though the State in question is not a member. This is so, for instance, in the Federal Republic of Germany, where the Federal Government may, by virtue of a statute of 28 February 1964 (*Bundesgesetzblatt* (1964–I), p. 187), grant immunity to any 'public international organisation'.

[3] Jenks, this *Year Book*, 22 (1945), p. 274. [4] *I.C.J. Reports*, 1949, p. 174, at p. 185.

body. Moreover, it would seem desirable to ensure that without recognition international organizations cannot participate in the law-making process which is peculiar to subjects of international law and may affect other members of the family of nations. It is impossible to discern any reason of substance or justice which, in the field of recognition, would support a differentiation between States and international corporations. In this connection, the largely sterile discussion between the constitutive and the declaratory view of recognition is quite immaterial. It is not to be doubted that, in relation to the non-recognizing State, the unrecognized State has no legal existence. The same applies to the international corporation the existence of which cannot be imposed upon non-recognizing States. In the realm of international organizations, as in that of State practice, the requirement of recognition is a necessary safeguard. There is no room for the often practised reliance upon the rule according to which a treaty cannot impose burdens upon third parties.[1] We are not concerned with rights and burdens. We are concerned with the question whether a State has accepted the existence of a new international person. This is a question of recognition.[2]

III

When a municipal judge, arbitrator or legal adviser comes to assess the status of an international corporation in municipal law, he will notice that sometimes legislators make things commendably easy for the practitioner, while at the same time they tend to mislead the theorist.

In the constitutions of many international corporations there is to be found a provision such as Article VII, Section 2, of the Articles of Agreement of the International Bank for Reconstruction and Development concluded at Bretton Woods in 1944:

> The Bank shall possess full juridical personality and, in particular, the capacity
> (i) to contract;
> (ii) to acquire and dispose of immovable and movable property;
> (iii) to institute legal proceedings.

Those States which became members of the Bank took (or may be expected to have taken) appropriate steps with a view to incorporating the Articles of Agreement or at least Article VII, Section 2, into their respective legal systems. If, for instance, in the United Kingdom the court has to decide upon the question of the Bank's legal personality, it applies Article VII,

[1] Seidl-Hohenveldern tends to rely heavily upon this rule: op. cit. (above, p. 146, n. 4), Nos. 321, 701.

[2] It is very remarkable that the problem of the recognition of international institutions in general and international corporations in particular has met with so little attention. Does an international corporation require recognition by other international corporations?

Section 2, which has become part of English law.[1] In many countries the whole of the Bank's Articles of Agreement are incorporated into the local law[2] and, therefore, there is no difficulty in resorting to and construing the text if a question arises which is not expressly dealt with, such as the question whether the acts of an Executive Director are within the scope of his powers.

It follows that in order to define the real problem with which the municipal lawyer may be confronted it should be assumed that the international corporation's status falls to be decided in a non-member State and recognition has either been granted to it or is unnecessary under the local law. (In this connection it should be remembered that in the Anglo-American world recognition is probably[3] a prerequisite of any municipal institution, such as a court, taking cognizance of the international corporation and that the existence or absence of recognition is certified by the Secretary of State for Foreign Affairs. On the Continent the courts are allegedly free to apply the law of a State or other international person[4] that lacks recognition. These are questions which cannot be pursued here, but are mentioned only to explain the assumption above referred to.) In such a case no part of the corporation's constitution is embodied in the local sovereign's legal system. Accordingly, it becomes necessary to revert to principle.[5]

This leads once more to the realization that there are two entirely different questions to be posed: First, which is the law that governs an international corporation's status? Secondly, what answer does the law so defined give to the substantive question that arises? The former inquiry involves the conflict of laws, the latter calls for the solution of the problem by the legal system that has been found to be applicable.

As regards the conflict question, it is a universal rule that the status of a corporation is determined by the corporation's personal law. There exists a well-known difference in practice about its identity, for the Anglo-

[1] S.R. & O. 1946 No. 36. In more recent years the United Kingdom has followed a different legislative technique. Orders-in-Council made in pursuance of s. 1 of the International Organizations (Immunities and Privileges) Act 1950 may provide that the international organization of which the United Kingdom is a member 'shall also have the legal capacities of a body corporate'. Numerous Orders-in-Council in fact so provide. But such a provision does not carry the point very far, for it leaves it open under what law the body corporate lives. Its existence as a legal entity is, of course, recognized. See now s.1 of the International Organizations Act 1968.

[2] In Germany, for instance: *Bundesgesetzblatt* (1952–II), p. 637.

[3] While the legal position is fairly clear in regard to States, the point has never been decided in regard to international organizations.

[4] On the Continent, likewise, there is no case in which a court in a non-member State had to consider the status of an international corporation. The doctrine that courts may apply the law of a non-recognized body was developed in cases of non-recognized governments, but the position relating to non-recognized States or other international persons is open.

[5] It is possible, though probably very rare, that even in member States the question of principle may arise. This may happen in cases which are not covered by the text of the corporation's constitution.

American countries define it as the law of incorporation: 'Just as the status of an individual, his birth, his death, his marriage and succession are governed by the law of his domicile, so also the status of a corporation, its creation, its dissolution, its amalgamation and succession are governed by the law of its incorporation.'[1] In other countries it is the seat that establishes the point of contact, and it is perhaps not entirely implausible that some have found a conceptualist difficulty in ascertaining the *lex societatis* of a corporation which, in a legal sense, has no seat; it is necessary, therefore, to find the point of contact which has the closest analogy with the seat of a municipal corporation. Even in countries adhering to the test of the seat it should not be too hazardous a suggestion that the law governing an international corporation is the law of incorporation, i.e. public international law.[2] As it has been said on a previous occasion in relation to the proper law of an 'internationalized' contract,[3]

> . . . the conflict of laws has in mind the localisation of legal relationships and . . . therefore, the conflict rule normally refers to a locally defined legal system. But this is no more than a form of words from which no dogma should be derived. When Savigny uses the well-known metaphor of the 'seat of a legal relation', he certainly contemplates territorially defined systems of law. But an all too literal interpretation would not be in harmony with his genius. Von Bar's phrase of the 'nature of the thing', Gierke's formula of the centre of gravity, and especially Westlake's figure of the law with which a contract has the most real connection no longer maintain the idea of localisation and prove that the reference to a legal system which is not territorially defined is fully reconcilable with the traditional doctrine of the conflict of laws. In any event, it must be emphasised, considerations of a conceptualist character cannot be decisive.

The conclusion is inevitable that, as a matter of the conflict of laws, an international corporation is subject to international law.[4]

Like all rules of the conflict of laws this is a rule of municipal law, put forward here primarily as a rule of the English conflict of laws, but probably entitled to acceptance by other systems of private international law. Accordingly, no fault can be found with the frequently proclaimed view[5] that the status of an international corporation in municipal law is determined, not

[1] *National Bank of Greece* v. *Metliss* (1957), 2–6. B. 33, 46, *per* Denning L.J. (as he then was).

[2] The conflict rule is not usually embodied in statutory provisions, so that fundamental reasoning should readily lead to the result. Even where there are statutory provisions it should not be difficult to draw an analogy.

[3] This *Year Book*, 35 (1959), p. 46.

[4] In the same sense Jenks, op. cit. (above, p. 149, 7), pp. 6, 10; Zemanek, *Das Vertragsrecht der Internationalen Organisationen* (1957), p. 30, who, however, does not mention the conflict rule at all, yet says of the treaty creating the corporation that 'it is single and indivisible and creates a person'; Seidl-Hohenveldern, op. cit. (above, p. 146, n. 4), No. 721, who makes the forceful point that there is no ground for refusing recognition of an international organization because it is created, not by and in one single State, but by several States on the footing of public international law.

[5] See, for instance, Dahm, *Völkerrecht* (1960), vol. 2, p. 8; or Beitzke, loc. cit. (above, p. 146, n. 4), p. 94.

by public international law, but by the municipal law of each State. Unless the treaty is part of the municipal law of the State concerned, it is the conflict rule of such municipal legal system that points to the applicable substantive law. But the point of contact, as defined by that conflict rule, is the legal system under which the body was created or incorporated, i.e. public international law.

The conflict problem has been discussed by few only. The suggestion which would make the 'seat' a point of contact, at any rate when the corporation's constitution fails to supply the answer, has already been described as unacceptable,[1] because it erroneously assumes the existence of a seat in the legal sense. Professor O'Connell[2] seems to favour 'the municipal law of the State in which the organisation is acting'. No argument is advanced in support of a theory which would mean that an international corporation may have as many different kinds of status as there are States in which it is acting. This would be contrary to accepted rules of private international law, their function and their rationale: it would lead to multiplying rather than reducing differences of result. A similar comment probably applies to Professor Friedmann, according to whom[3]

> . . . the legal status of an international organisation at the present time is based on the multi-national principle, i.e. on the agreement between the treaty-making parties to confer full juridical status within their jurisdiction on the international organisation concerned. Legal personality is thus detached from the dependence on the law of any one country, although the implementation of its legal capacity must of necessity be determined *by the laws of the State in whose jurisdiction it has to be exercised.*

In the following sentence the learned author looks to the future, when international status 'will no longer have to be anchored in the national laws of the member States of the organisation'.[4] However much these passages may be lacking in precision, they do seem to reject the idea that international organizations are, even on a national level, subject to international law. It is possible that this view is due to the failure to appreciate the effect of the municipal rule of the conflict of laws. Finally, it is proper to mention the latest and particularly well documentated study by Professor Beitzke, which like most others primarily deals with the problem of legal personality.[5] It seems to suggest that the municipal status of an international organization 'becomes material to a municipal system of law only by way of the treaty and its incorporation into such system'.[6] Or,[7]

> . . . as municipal personality can result only from the municipal law of the various States, in the case of a treaty providing for municipal personality this is granted upon

[1] Above p. 151.
[2] *International Law*, pp. 107–8.
[3] Op. cit. (above, p. 147 n. 3), pp. 288–9 (italics supplied).
[4] Ibid., p. 218.
[5] Loc. cit. (above, p. 146, n. 4).
[6] Ibid., p. 86.
[7] Ibid., p. 94.

an international organisation in pursuance of the treaty by the various members of such organisation. There are as many grants of personality as there are State members of the organisation. There arise parallel personalities all of which relate to the same substratum, the same organisation. It would not be accurate to assume, as writers have occasionally done, a common grant of personality by all member States. It is only the treaty that is common; but this is derived from public international law and cannot grant personality with direct effect for the municipal legal system. Within the individual systems of law personality is granted only by the individual legal systems. . . . In sum, there does not exist an international or supranational, but a plurinational personality of international organisations and institutions.

This view seems to involve the conclusion that in non-member States an international corporation cannot have any claim to existence at all and that in member States it has the legal position defined by such provisions of the treaty as are adopted by the local law. It is not possible to attempt an explanation of this somewhat surprising theory. The basic criticism to be levelled against it is that it disregards altogether the rule of private international law according to which the status of a corporation is determined by its personal law and that in all the circumstances this can only be public international law which includes, of course, the terms of the treaty. If and in so far as these are part of municipal law, many conflict problems are solved or eliminated, but such adoption does not affect the overriding control of public international law or nationalize what is essentially international. If a Ruritanian court has to consider the status of a corporation which is incorporated and has its seat in France, it is directed by its private international law to apply French law. Similarly, if the Ruritanian court has to deal with a corporation created and operating under public international law, the same rule of private international law, applied directly or by way of analogy, demands the application of public international law.

In conclusion, it may be useful to recall Dr. Jenks's attractive summary:[1]

The legal capacity of public international organisations, like that of individual foreign States, derives from public international law; municipal legislation may be necessary to secure effective recognition of this capacity for municipal purposes but the function of such legislation is declaratory and not constitutive; it is compatible with the declaratory function of such legislation that it should prescribe any conditions which may be thought appropriate for the exercise within the jurisdiction of the State concerned of legal personality attributed to the organisation in question by an international constituent instrument or by customary international law; but it is as inherently fantastic as it is destructive of any international legal order to regard the existence and extent of legal personality provided for in the constituent instrument of an international organisation as being derived from, dependent upon, and limited by, the constitution and laws of its individual member States.

IV

The largely theoretical character of the preceding analysis will strike

[1] This *Year Book*, 22 (1945), p. 267, at p. 270.

some readers as unattractive and unhelpful, but the abstract problem has perplexed many and, in view of the very limited judicial material so far available, it would be lacking in respect to formative academic thought if its principal representatives and their preoccupations had not been accorded due attention. Yet it remains much more significant to turn to the more practical aspects of an international corporation's status, which have already emerged or may in future require clarification.

As regards legal personality in particular, a body is a legal person if it exists as such, distinct and separate from its founders and members, independent of all persons or institutions other than its own organs. There is, so it should be added, no justification for speaking of the extent of legal personality, of complete or partial personality. A person that exists has personality and it would be tautologous to describe it as having full personality. Less than 'full' personality is not known to the modern law.[1]

A body existing in and under public international law as a legal person, as a body corporate, is (or should be) recognized and treated as such universally. In particular, for the reasons which have been developed it is (or should be) accepted as an international person by the legal systems of both member and non-member States.

Whether or not a body exists as a legal person is a question which in many countries depends on the presence or absence of recognition but, subject to local practice on this point, depends on public international law, that is to say, usually, on the interpretation of the treaty of establishment.[2] The problem has long been familiar to international lawyers and its solution has been much assisted by the decision of the International Court of Justice in the case of *Reparation for Injuries Suffered in the Service of the United Nations*;[3] but, it should be emphasized again, that this related to a very special case and does not therefore lend itself to generalization, and that its reasoning has been much criticized.[4] The answer depends on a close investigation of the terms of the international organization's

[1] It is, of course, possible to have less than full capacity in the sense of active capacity (see above, p. 146, n. 4). The distinction has been blurred by a large number of writers, particularly in Germany.

[2] Resort may of course be had to other sources of international law. Seidl-Hohenveldern, op. cit. (above, p. 146, n. 4), No. 722, suggests that it might be justifiable to apply the principles of law common to the municipal law of member States. Where there are such principles, the suggestion may well be in line with the demands of a reasonably developed commercial law of nations; see this *Year Book*, 31 (1954), p. 39. But elsewhere the familiar and established sources of international law must prevail.

[3] *I.C.J. Reports*, 1949, p. 174. That the observations of the Court do not necessarily apply to international organizations other than the United Nations is rightly emphasized by Paul de Visscher, *Recueil des cours*, 102 (1961–I), p. 483.

[4] Particularly by Professor Verzijl, *The Jurisprudence of the World Court* (1966), vol. 2, p. 42, who describes it as 'rather flimsy and lacking in coherence from the doctrinal point of view'. For other criticism, see Schwarzenberger, op. cit., vol. 1, p. 129; Zemanek, op. cit. (above, p. 155, n. 4), p. 27.

constitution.[1] Such terms as provide for legal personality in member States will be equally important in non-member States, for, to take an example, a corporation formed in France under French law and with a view to activities in France is a corporation elsewhere notwithstanding the absence of any provision to this effect in French law or in the corporation's constitution. The curious idea that an international corporation cannot have any existence in the eyes of municipal law except as a result of special and express municipal legislation (rather than the conflict rule) is reminiscent of what more than a hundred years ago happened in the conflict of laws relating to corporations of foreign nationality. In 1839 it was believed in the United States of America[2]

> . . . that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence.

And ten years later, in a similar vein, the Belgian *Cour de Cassation* treated a French corporation as non-existent.[3] Surely such absurd scruples no longer trouble the modern private international lawyer, irrespective of whether the corporation is national or international in origin.

It is, accordingly, by no means surprising to notice that practitioners do not seem to have experienced any difficulty. Much of the evidence comes from Italy where already in 1930 the *Corte di Cassazione* decided[4] that the International Institute of Agriculture, in view of the terms of the treaty setting it up, was 'an international legal person'. More recently a most interesting case came before the Tribunal of Florence.[5] The defendant was the Headquarters of Allied Forces, Southern Europe, established under the North Atlantic Treaty. In the course of the judgment the Court said that

> . . . under our legal system an Italian Court may apply the rules of international law which regulate the legal status of the Allied Headquarters even without the enactment of specific laws ratifying and bringing into force the relevant convention. One of the rules of our private international law . . . can be applied to the case before the Court. Article 17 paragraph 1 enacts that the status and the legal capacity of persons are

[1] For a short, but helpful statement, see Bowett, *The Law of International Institutions* (1963), p. 275. Or see Dahm, op. cit. (above, p. 155, n. 5), pp. 6 et seq, with further references.

[2] *Bank of Augusta* v. *Earle*, 13 Peters 519 (1839).

[3] See Batiffol, *Droit international privé* (4th ed., 1967), Section 201.

[4] 26 February 1931, *Rivista di diritto internazionale*, 23 (1931), p. 386, also *Annual Digest*, 1929–1930, p. 413.

[5] 2 January 1954, *Rivista di diritto internazionale* (1955), p. 354, also I.L.R. (1955), p. 758, at p. 761. The decision of the United Chambers of the Corte di Cassazione, 14 June 1954, *Giurisprudenza italiana* (1954–I), p. 904, also I.L.R. (1955), p. 754, is less clear on the point now under discussion. It finds that the North Atlantic Treaty Organization is an autonomous subject of international law, but it seems to rely on the Italian law which brought the treaty into operation in Italy.

regulated by the law of the State to which they belong. With that provision in mind the solution of our problem appears simpler.

On the basis of this reasoning, which is entirely in conformity with the submissions in this article, and interpreting the terms of the relevant treaties, the Court reached the conclusion that the North Atlantic Treaty Organization had created the Headquarters as a subject of international law having juridical personality. A similar case occurred in Belgium, where the United Nations brought an action against a former U.N.R.R.A. officer. In his defence he denied the legal personality of the plaintiff. The *Tribunal Civil* of Brussels pointed out that the treaties setting up the United Nations and U.N.R.R.A. had been ratified by Belgium and continued:[1]

Since these public international establishments have been recognised by Belgium, they have legal personality in Belgium.

The most authoritative decision, also relating to U.N.R.R.A., was rendered by the Dutch *Hooge Raad*.[2] The Court of Appeal at Utrecht had held that 'U.N.R.R.A. had been called into existence as a separate body capable of entering into legal relationships. As a result it must also be considered a legal person under Dutch law and as such competent to act as a party to legal proceedings.' Under Dutch law an appeal to the supreme tribunal only lies if a violation of a rule of Dutch law is alleged. In the present case the *Hooge Raad* declared the appeal inadmissible, because 'the question whether such a body must be recognised as a legal entity in an action in Holland did not depend on any provision of Netherlands law'.

V

Public international law (which includes, of course, the constituent treaty) also governs the international corporation's corporate status.

1. This rule applies, in the first place, to the question whether the member States are in any way responsible for the corporation's liabilities and, if so, whether their liability is limited or unlimited. The existence of a body corporate does not necessarily relieve member States of such responsibility. The corporation may be the agent of its members. In France a partnership enjoys legal personality. In England an unlimited company is a body corporate. Yet in both cases members are, or may be, liable to the corporation's creditors.

The answer is not always as clear as in the case of the East African Development Bank, for Article 4 (9) of its Charter provides that 'no member shall be liable, by reason of its membership in the Bank, for obligations of the Bank'. There is a similar provision in Article II, Section 4, of the Articles

[1] 27 March 1952, *Pasicrisie belge* (1953–III), p. 65, also I.L.R. (1952), p. 490.
[2] *Annual Digest*, 1949, p. 337.

of Agreement of the International Finance Corporation. But in the case of the International Bank for Reconstruction and Development,[1] and in that of the Inter-American Development Bank,[2] 'liability on shares shall be limited to the unpaid portion' of the issue price of the shares, there being no express statement as to whether, to the extent of any such unpaid portion, a creditor of the Bank may claim directly against the member. As a matter of substantive law the answer will depend on the construction of the treaty and on such general principles as the company law of civilized nations may have developed.

2. A similar problem arises as a result of the provision, included in most Charters of international banking institutions, that shares 'shall be transferable only to the Bank'[3] and that, when a State ceases to be a member, the Bank may and, indeed, shall arrange for the repurchase of its shares.[4] In other words, the Bank, so it seems, may purchase its own shares and thus bring about a reduction of its capital without any reference to its creditors—a situation which in the municipal company law of many civilized nations is considered as wholly illegal and involving the direct liability, towards the corporation's creditors, of the shareholder who is repaid. The point is, however, not free from doubt, for under the heading of 'suspension of operations and settlement of obligations' one finds a provision to the effect[5] that 'no distribution shall be made to members on account of their subscriptions to the capital stock of the Bank until', *inter alia*, 'all liabilities to creditors have been discharged or provided for'. But this qualification may apply only in case of the suspension of operations and, accordingly, may not cover the ordinary case of a transfer of a share to the Bank or of its repurchase by the Bank.

3. A further illustration of the problems likely to arise is to be found in the fact that none of the Charters at present available makes adequate provision for the case of the corporation's insolvency—a contingency which States apparently prefer to ignore, but which, in the interest of creditors, should not be treated as entirely academic. Are all securities granted to creditors effective even if their creation precedes the suspension of operations only by a few days? Would a liquidator or receiver appointed by a court at the instance of a bondholder have in law rights and powers in respect of the affairs of the corporation and would he be subject to the *lex loci* or to public international law?

In most cases the Charter refers, somewhat euphemistically, to 'termination of operations'. This occurs as a result, not of the creditor's initiative, but of a resolution of the governing body. If such a resolution is passed,

[1] Art. II, Section 6. [2] Art. II, Section 3 (d), and Art. IV, Section 5.

[3] See, for instance, Articles of Agreement of the International Bank for Reconstruction and Development, Art. II, Section 10.

[4] See, for instance, ibid. Art. VI, Section 4 (b). [5] Art. VI, Section 5 (e).

it is true, 'the Bank shall forthwith cease all activities except those incident to the conservation, preservation and realisation of its assets and settlement of its obligations',[1] and, as has already been pointed out, assets shall not be distributed to members before the discharge of all debts. Nothing is said, however, about the power of those in control. Apparently the governing organ continues to function. No liquidator is appointed. Nor is anything said about the order of priority in which debts are to be paid. Can arrears of salaries or current salaries be paid notwithstanding the cessation of all activities?

If one disregards the problem of immunity which may, or may not, prevent the appointment of a liquidator or receiver by a municipal court,[2] the type of problem here contemplated should, it is submitted, be subject to the *lex loci* of the tribunal. The questions are incidental to the procedure to be followed by a liquidator or receiver who derives his powers from, and is appointed by virtue of, the *lex fori*. The personal law of the corporation is to a corresponding extent superseded by the local law. This is contrary to the view of Dr. Jenks who would apply the corporation's 'personal law, which is international in character'. The reason is said to be that 'special considerations apply to an international body corporate which, *ex hypothesi*, was created as such to place it outside the control of any one State'.[3] This is correct, but the argument is not in point, because we are dealing with a case in which a municipal tribunal in fact has made an order which can, of course, have effect only within its own territory. It is, therefore, not very helpful to base an argument upon the suggestion that the local tribunal ought not to have made an order.

4. Finally, a few words should be devoted to the case in which two or more international corporations are merged or amalgamated into a single corporate body. This could occur by virtue of a treaty between the corporations, which would have to be authorized by a (probably unanimous) resolution of the member States and which one would expect to make provision for the fate of the assets and liabilities of the amalgamated bodies. Suppose these own buildings and are entered as proprietors in the local land registers. Is the registrar entitled, merely by virtue of the treaty of amalgamation, to register the new corporation as proprietor? Or suppose one of the old corporations has issued bonds which are introduced at a Stock Exchange and held by private individuals. Can the bondholders claim against the new corporation or can they prevent a transfer of assets except upon terms giving them adequate security? Does it matter, for these purposes, whether the bonds are subject to the municipal law of a given

[1] See, for instance, Agreement relating to the Inter-American Development Bank, Art. X, Section 2.

[2] See below, pp. 169 et seq.

[3] Jenks, op. cit. (above, p. 149, n. 7), p. 202.

State or to public international law? Such questions, admittedly, will not often arise, but they are far from unrealistic, because even if the constitutions of existing international corporations seem to contain sufficient safeguards they are liable to be altered; moreover, none of them deals specifically with the contingency of a merger.

From the point of view of municipal law, such problems as relate to status should, it is submitted, be answered by the corporation's personal law, i.e. public international law.[1] If, under the treaty, the new corporation is the universal successor of the predecessor corporations, the mere production of the treaty should be sufficient to permit the registration of the new corporation in the land register; if, on the other hand, the new corporation is no more than an assignee or transferee of property, an instrument of transfer conforming to the requirements of the local law would appear to be required. Or, to take another example, if the treaty provides for universal succession, the new corporation would, in international law, be subject to all liabilities and municipal law should recognize such succession. On the other hand, to take over all assets without taking over all liabilities or for less than full consideration would plainly disentitle the treaty to be recognized in either international or national law. In such a case *ordre public* would override all obstacles, including the rules of immunity, and permit and, indeed, compel the appointment of a liquidator or receiver in accordance with such provisions as national laws may include.

VI

As a result of the conflict rule which prevails in the municipal laws of the world, the legal existence, or personality, of an international corporation as well as its corporate status, as we have seen, is, and is bound to be, subject to public international law, irrespective of the context in which it falls to be considered. It does not matter whether, for instance, the personality of the corporation becomes an issue in connection with the corporation's *locus standi* in an international court or as a result of some act or transaction performed on the level of municipal law. The origin of the corporation, the source of the law governing its status, is always the same.

In other fields, however, a further problem of some complication remains to be solved. Take the case of a fraud committed by an official of the corporation. If it occurs in the course of negotiations about a loan to a State, i.e. within the realm of public international law alone, the

[1] On the principles of the conflicts of laws, see the decisions of the House of Lords in *National Bank of Greece* v. *Metliss* (1958), A.C. 509 and *Adams* v. *National Bank of Greece* (1961), A.C. 255, which give much guidance on the problem of characterization which underlies the discussion in the text.

imputability of the official's tortious act to the corporation depends on the rules about international or 'State' responsibility. Such cases are outside the scope of the present article. Now suppose that the fraud is committed when the official negotiates a lease of premises intended to be used by the corporation's branch office and that the corporation's capacity to commit a (municipal) tort is in issue. According to the conflict rule of the forum such a question may be subject, not to the personal law governing the wrongdoer's status, but to the *lex loci delicti commissi*. In such a case the conflict rule does not refer to public international law and its constituent sources such as treaties. Again suppose that the international corporation grants the loan to a private company whose government guarantees it, that the loan is governed by a municipal system of law, but that the guarantee is subject to international law. Here municipal liability for the official's fraud depends not only on the place, but also on the sphere of tort, and the first task is to ascertain whether the issue arises on the international or the municipal level. In the latter case the conflict rule of the forum determines the branch of law applicable to the question of capacity. In the following discussion it will be assumed that the issue arises on the level of municipal law.

The capacity to act is a quality which is different not only from the (antecedent) problem of the corporation's existence or personality, but also from the (subsequent) problem of the authority of the corporation's particular organ that is acting. Capacity is the ability or power of a corporation in law to perform the act in issue. The question of whether an act is *intra* or *ultra vires* the corporation has numerous aspects and implications only some of which will be referred to.

1. As a matter of the conflict of laws, it is a general rule that capacity, being an ingredient of a person's status, is governed by the personal law. In the case of international corporations, as has been shown, this is public international law. The only doubt is whether the exception frequently admitted or advocated in favour of the *lex loci actus* or some similar system such as, perhaps, the law with which the contract is most closely connected,[1] should apply in the case of international corporations. Suppose that the International Bank for Reconstruction and Development has, under international law, the capacity to enter into a certain contract, but it is made by its Geneva branch under Swiss law with a Swiss merchant. Had the corporation been created under the law of, or were it to have its seat or residence in, a given country, the conflict rule might refer the question of capacity to Swiss law rather than the *lex societatis*. Should such an exception be allowed to prevail in the case of international corporations? It is submitted that the answer should be in the negative. The exception is intended to

[1] Dicey and Morris, *Conflict of Laws* (8th ed., 1967), p. 744.

protect the trader who may reasonably have believed in the capacity of the person he is contracting with. International corporations are still so limited in number, their transactions within a municipal system of law are so unusual, their very character is still so obscure that the burden of inquiry which the rule imposes and the exception qualifies does not appear unreasonable. International corporations, moreover, administer public funds and are themselves entitled to protection. It would be much too facile a view that everyone should expect them to enjoy the powers with which national corporations are known to be endowed.[1]

2. The nature and extent of an international corporation's powers are often expressly defined in the constitution. Thus the power to contract, to acquire and dispose of property and to institute legal proceedings is expressly conferred not only by the Articles of Agreement of the International Bank for Reconstruction and Development,[2] but by many other treaties.[3] Yet this enumeration is misleading, because the powers so enumerated are both too wide and too narrow. Is the Bank, for instance, meant to enter into all contracts of any kind or to acquire any property? Can it accept bills of exchange or issue letters of credit or build a concert hall? Can it buy a hotel or a painting by Picasso and does it matter whether the hotel is intended as an investment or a vacation home for members of the staff, or whether the painting is a speculation or an ornament for the board room? Does the power to institute proceedings extend to an action against a member State?[4] On the other hand, it is obvious that the Bank must have additional powers to those enumerated, such as the power to lease or inherit property or defend proceedings. And although more will have to be said about this, it does seem unlikely that the Bank has no power to commit a tort such as a libel or a fraud.

The powers enumerated in the constitution of an international organization, no less than those enumerated in the constitution of a federal State, are clearly only an illustration, a guide. It is the totality of the constitution, of its terms, intentions, purposes and functions that has to be looked at to ascertain the corporation's capacity. In the case of the Bank this is made clear by the provision[5] that it 'shall be guided in all its decisions by the purposes set forth above'. In other cases one finds the provision[6] that 'the resources and facilities of the Bank shall be used exclusively to implement

[1] Cf. Hahn, *Columbia Law Review*, 62 (1962), p. 915.

[2] Above, p. 153.

[3] Agreement relating to the Inter-American Development Bank, Art. XI, Section 2; Agreement relating to East African Development Bank, Art. 43 (for these Agreements see above, p. 149, nn. 2, 5).

[4] An affirmative answer was given by the decision in *Balfour Guthrie & Co. Ltd.* v. *United States*, 90 F. Supp. 831 (1950), also *I.L.R.* (1950), p. 323.

[5] Art. I, paragraph 2.

[6] Inter-American Development Bank (see above, p. 149, n. 2), Art. III, Section 1; East African Development Bank (see above, p. 149, n. 5), Art. 8.

the purpose and functions enumerated in Article 1 of this Agreement'. The functional approach to the definition of an international corporation's capacity which the constitutions thus enjoin, is in line with the tendencies which dominate the law of international organizations in general since in two fundamental decisions the International Court of Justice took 'the purposes and functions as specified or implied in its constitutional documents and developed in practice'[1] as a yardstick. Yet this represents, not a solution, but a starting-point only. In a given case the decision is liable to be fraught with uncertainty and difficulty. Where the commercial activities of an international corporation are concerned, it will, therefore, be particularly appropriate and helpful to remember the analogies which private law provides. The doctrine that a corporation's powers are determined by its constitution is firmly developed in Anglo-American law; in France it is known as the *principe de spécialité* and in Germany it has recently come into prominence in a limited field.[2] In private law, it is true, fine distinctions are being drawn between corporations of public and private law, corporations sole and aggregate, statutory and charter companies, commercial and non-commercial entities and so forth. In the case of international corporations a broader view will have to be taken and the common element[3] will have to be discovered and applied, though the analogy provided by the law of public law corporations will have to be given special weight on account of the employment, in both cases, of public funds.

3. As regards liability for tort, in particular, the functional approach is again likely to afford some guidance. The experience of municipal law seems to teach us that if a tort is incidental to some act that is *intra vires* it is itself *intra vires* the company.[4] Accordingly, if an Executive Director of the International Bank for Reconstruction and Development, in granting a loan in conformity with the Articles of Agreement, defrauds a borrower, the Bank would seem to be liable. Suppose, however, that the tort is incidental to an act that is *ultra vires*: The Executive Director commits a libel while communicating a commercial letter of credit purported to be opened by the Bank in favour of a private person. Since the issue of such a letter of credit is outside the powers of the Bank, it probably cannot be liable for the Director's tort.

[1] *Reparations for Injuries Suffered in the Service of the United Nations, I.C.J. Reports*, 1949, p. 149, at p. 180; *Certain Expenses of the United Nations*, ibid., 1962, p. 168. For a useful survey, see Brownlie, *Principles of Public International Law* (1966), p. 526.

[2] For a comparative survey, see W. Kunkel, *Rechtsvergleichendes Handwörterbuch*, vol., 4, pp. 578–81. The *principe de spécialité* was invoked as early as 1931 by Gutzwiller, op. cit. (above, p. 148, n. 3), pp. 126–7. As to Germany, in particular, see, for instance, Enneccerus-Nipperdey, *Allgemeiner Teil* (1959), Section 105, and the fundamental decision of the Federal Supreme Court, 28 February 1956, BGHZ 20, 119.

[3] See, generally, Zemanek, op. cit. (above, p. 155, n. 4), p. 29.

[4] See, for instance, Gower, *Modern Company Law* (2nd ed., 1957), p. 91, or Winfield, *On Tort* (7th ed., 1963), pp. 80–83.

4. The legal effects of an act which is *ultra vires* the international corporation can only be assessed by the application of rules developed in municipal law. Such an act, though not illegal,[1] is void and incapable of being ratified or of becoming valid by estoppel, laches or acquiescence.

In private law an act that is outside the corporation's capacity could be validated by retrospective legislation. Are the members of an international corporation to be put on the same level as the municipal legislator and, therefore, entitled to change the corporation's constitution? Or are they merely in the position of members of a municipal company who are themselves subject to the law and unable to alter it? It is suggested that the former question requires an answer in the affirmative, but the resolution must be unanimous, for *ex hypothesi* the act is not within the purposes of the corporation, a new purpose would have to be introduced into the constitution and, if the resolution is to be *intra vires*, this cannot be done by a majority decision. But in the event of unanimity there is no reasonable ground which would prevent the members of the corporation from acting as legislators.

5. The question whether a particular act is within or beyond the capacity of the international corporation is to be decided by the tribunal before which the point arises. The answer will invariably depend on the interpretation of the corporation's constitution in the light of all the relevant circumstances.

A certificate issued by the executive organs of the corporation will not be conclusive and, one would expect, will be inadmissible as evidence in legal proceedings. There is nowhere any provision supporting the legality of the issue and utilization of such a certificate.

Since the Bretton Woods Agreements of 1944 it has (unfortunately) become fashionable to provide that questions of interpretation arising between the international corporation and its members or between members are decided by the highest organ of the corporation 'whose decision shall be final'. The nature and extent of such 'finality' is in many respects not free from doubt, but it is submitted that in proceedings with a private person the tribunal is both entitled and bound to disregard the allegedly 'final' decision and to reach a result on the footing of its own investigation of a purely legal character. This should be so even where the private party before the tribunal belongs to a State which is a member of the corporation and thus bound by the terms of its constitution. The Article providing for the 'finality' of decisions on legal points extrajudicially arrived at should be narrowly construed. When it refers to 'members', it should be understood to mean the member States only to the exclusion of their

[1] On illegality, see E. Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations,' in *Cambridge Essays in International Law* (Essays in Honour of Lord McNair), p. 88.

nationals. It would be intolerable if, in the absence of a compelling text and a formulation of unquestionable clarity, private persons and municipal tribunals were, in a justiciable matter, subjected to the 'finality' of a decision which is not supported by reasons, which is not rendered by lawyers after due process of law, and which may be derived from political or other reasons far removed from legal appreciation.

VII

The acts of a corporation, whether national or international, are necessarily performed by individuals whose ultimate source of authority is the corporation's constitution. Whether, in the case of an international corporation, a particular act can be performed by the holder of a particular office is a question of law to be decided by the constitution or any rule of international law that may be applicable; whether a particular person is the holder of a particular office is, normally, a question of fact.

Among the numerous problems to which the acts of the agent of an international corporation may give rise, the scope of his authority is in practice probably the most important. According to the constitution of the Inter-American Development Bank, 'the President of the Bank shall be the legal representative of the Bank'. He conducts its 'ordinary business' under the direction of the Board of Executive Directors who shall also appoint, and confer authority and functions upon, the Executive Vice-President and may appoint other Vice-Presidents.[1] Since there is no public register recording the status of each Vice-President, it is obvious that, while the President can automatically perform all acts that are *intra vires* the corporation, a Vice-President will in each case have to prove his authority.

To what extent is an international corporation bound by the acts, done on the level of municipal law, of an official?

This is a question which, it is submitted, depends not on the law of the country where the act is performed or whose law governs the transaction in issue, but on the constitution of the corporation, that is to say, on public international law. The analogy of the conflict of laws would seem to support the suggestion. Once again there is no need for the protection of those who enter into business with so rare a body as an international corporation. Its character is still so unusual, its occurrence is still so infrequent that private individuals contracting with it may fairly be put on inquiry.

If, then, the authority of an official is primarily determined by the treaty establishing the corporation, third parties dealing with the corporation must be treated as having knowledge of the terms of the treaty. Thus, in the case

[1] Art. VIII, Section 5.

of the Inter-American Development Bank it must be clear to everyone that a member of the Board of Governors has no executive authority or function and that, in the absence of special circumstances such as estoppel, his acts cannot bind the corporation.

On the other hand, much can be said in favour of the proposition that a third person is not expected to make inquiries beyond the text of the treaty. Thus the Board of Governors and the Board of Executive Directors of the Inter-American Development Bank 'may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank'.[1] If such rules and regulations should purport to preclude the President from entering into a particular transaction, this is unlikely to affect a third person who has no actual or constructive knowledge of the restriction; as a Governor will have notice and may have to be considered a representative of his State,[2] a member State probably cannot help being saddled with notice. Nor is it the third party's business to inquire whether there was the quorum required by Article VIII, Section 3 (f) for the meetings of the Board of Executive Directors, at which a resolution was passed.

In short, it is submitted that if an international corporation transacts business with a private person its liability for the acts of its officials is determined by its constitution supplemented by those general principles of law which in similar situations are applicable to municipal corporations. Accordingly, where the international corporation's liability falls to be considered in a municipal tribunal, the guiding analogy is, not that of the responsibility of States for the acts of its officials, but the corporation law of the civilized world. This does not mean that, in adopting and following the comparative method, the law of State responsibility should be ignored; on the contrary, it may, on some aspects, provide assistance. But it does not necessarily or even primarily govern. Thus, it is plain[3] that in resisting an international claim a State cannot rely upon its municipal law, including its constitution, as a defence. An international corporation, sued in a municipal tribunal, may, within the limits referred to, invoke its constitution to assert the defence that the impugned acts were *ultra vires* its official.

VIII

The last problem which requires clarification relates to the international corporation's immunities and privileges. These are by no means the same in both member States and non-member States.

1. As concerns the former, the text of the treaty creating the corporation invariably defines the extent of the immunities. If any doubt arises it has

[1] Art. VIII, Section 2 (g).

[2] Art. VIII, Section 5 (d) would seem to support this conclusion. It provides an *argumentum a contrario*.

[3] See, for instance, Brownlie, op. cit. (above, p. 166, n. 1), p. 369.

to be resolved primarily by construing the provisions of the treaty. They are usually incorporated into the municipal law of member States[1] and since the Bretton Woods Agreements[2] have become almost standardized. They extend to immunity from judicial proceedings, immunity of assets, inviolability of archives, immunity of assets from restrictions, privileges for communications, immunities from taxation, personal immunities of officers and staff.

This is not the place to write a commentary upon these provisions which, in many respects, are identical with those applicable to numerous other international organizations.[3] But in view of the references to proceedings brought in municipal courts against international corporations, which more than once were made in the course of the preceding observations, it is perhaps helpful to dwell upon the scope of the immunity from judicial proceedings envisaged by the standard clause.

Such immunity exists only in those member States in which the Bank has neither an office nor an agent authorized to accept service of process nor issued or guaranteed securities.[4] To put it affirmatively, the Bank may be sued in the courts of any member State in which it has an office or an agent authorized to accept service of process or issued or guaranteed securities.[5] The immunity is, accordingly, very limited indeed.[6] Its restricted scope is underscored by the fact that after final judgment has been pronounced against the Bank its property becomes subject to seizure, attachment or execution. This would clearly include the appointment of a

[1] In the United Kingdom the statutory basis is now to be found in the International Organizations Act 1968. By virtue of s. 1 (1) it applies to any international organization declared by Order-in-Council to be one of which the United Kingdom or one or more sovereign Powers are members. According to s. 1 (2) the Order-in-Council may provide for the immunities set forth in Part I of Schedule 1. These differ, both in wording and scope, from those usually included in the treaty; in particular immunity of assets is not mentioned at all. Where a conflict arises the provisions of the Order-in-Council will, in the United Kingdom, have precedence.

[2] These were incorporated into the law of the United Kingdom by the Bretton Woods Agreements Order, S.R. & O. 1946 No. 36.

[3] See, generally, Jenks, *International Immunities* (1961).

[4] Where are securities issued or guaranteed? This may be a peculiarly elusive problem. It should not be solved by investigating the narrow question of the *locus contractus* in municipal law, but the liberal approach of public international law, assisted by comparative research, should prevail. Thus it is suggested that the place of issue is not only the place where the bond, duly signed by the borrower, is delivered to the lender or his agent, but also the place where a prospectus is published or where the bonds are introduced at a Stock Exchange.

[5] The question whether proceedings may be brought even in respect of acts which arise *jure imperii* is probably otiose, for in so far as international corporations act *jure imperii* (for instance, by entering into a treaty) municipal courts are in any event unlikely to have jurisdiction, so that there is no room for the problem of immunity.

[6] In *Lutcher S.A.* v. *Inter-American Development Bank*, 382 F. 2d 454 (1967), also *International Legal Materials*, 6 (1967), p. 683, the defendant Bank tried to extend the immunity by the argument that the provision referred to in the text applied only to suits by bondholders and other like creditors and the beneficiaries of its guarantees. The Court of Appeals for the District of Columbia had no difficulty in rejecting so untenable an argument and also indicated that the provision did not merely describe available venues.

liquidator or receiver. Whether a court is entitled, pending judgment, to grant interlocutory relief by appointing a provisional liquidator or receiver is less certain. Such an appointment would involve measures which are probably intended to be comprised in the prohibited 'seizure' of property and, moreover, 'final judgment' seems to mean a judgment finally disposing of the cause of action, though subject to appeal. It would seem likely, therefore, that such interlocutory relief cannot be granted.

The text of the standard clauses does not refer to arbitration proceedings brought against the international corporation and thus confirms the view[1] that an international person cannot, by virtue of its immunity, avoid arbitration proceedings; moreover an award pronounced against it can be turned into a final judgment by a tribunal in any member State in which the corporation could be sued. Similarly, it is at least doubtful whether the standard clauses refer to criminal proceedings against the corporation or whether its criminal liability is a *casus omissus*. 'Actions . . . brought against the Bank' is a phrase that would seem to contemplate primarily civil proceedings. Yet it is difficult to believe that it was intended to render an international corporation subject to prosecutions. It is an *a fortiori* argument that should lead to the exclusion of criminal 'actions'.

This leads to the comment that, where the international corporation's constitution enumerates its immunities and privileges, the list is exhaustive and customary international law cannot be invoked to extend it. The texts usually state expressly that the corporation shall have the immunities and privileges 'set forth in this Article'. Such words, it is submitted, exclude all other immunities.

2. There remains the much more difficult and important problem of the international corporation's immunities in such States as are non-members of, but have recognized, the corporation.

(*a*) Can these immunities be wider than those envisaged by the corporation's constitution for operation 'in the territories of such member'? In other words, does the constitution define the maximum of the immunities to which the corporation is entitled anywhere? Suppose the corporation has an office in a non-member State. Can it be said that it is not entitled to immunity from judicial proceedings, because if the office were in a member State it would not be so entitled? Or the corporation has issued securities in a non-member State. Is it subject to the jurisdiction of the courts in such State on the grounds that it would be subject if the issue had taken place in a member State?

The point is by no means free from doubt, but it is submitted that in non-member States immunity depends upon the general body of

[1] See Mann, 'State Contracts and International Arbitration', p. 15 of this volume of this *Year Book*.

international law and it is irrelevant that 'in the territories of each member' the immunity is more restricted. There are good reasons why in a member State the corporation's privileges are limited, for the corporation and the totality of its members know each member, its legal system and standards. Hence it may well concede greater subjection to the law and jurisdiction of member States than would be acceptable elsewhere.

(*b*) Nor can it be suggested that the immunities recognized in the international corporation's constitution must be regarded as the minimum and cannot, therefore, be exceeded. If customary international law allows a lesser scope to the doctrine of immunity, the international corporation does not acquire additional immunities by reason of the fact that in a member State it would enjoy them. According to customary international law as understood in some countries an international corporation whose primary function is the promotion of the investment of public and private capital for development purposes[1] is probably not entitled to immunity at all. It does not become so entitled by reason only of its status in member States.

(*c*) The constitution of an international organization is, accordingly, no more than a piece of evidence, one of the many sources of customary international law. Broadly, the immunities and privileges of an international corporation in non-member States must be derived from the general body of customary international law. The real question is whether and to what extent, in regard to immunities and privileges, international corporations are to be equiparated to States.

No judicial decision has as yet pronounced upon this question. Legal literature is frequently unhelpful in that no clear distinction is drawn between the law in member and non-member States; the number of authors who discuss the latter only is very small. Nor is it always clear whether the discussion relates only to immunity from suit or extends to a wider, and perhaps even to the whole, range of immunities. Professor Sorensen, referring to immunity from suit and execution only, supports the conclusion, derived from Article 105 of the United Nations Charter and the General Convention on the Privileges and Immunities of the United Nations,[2] that 'une règle coutumière est sur le point de s'établir'.[3] Dr. Lalive gives the impression that the approach should be a functional one and that from this point of view the general immunities of an international organization are 'une necessité inéluctable'.[4] Similarly, Professor Reuter asserts that international organizations 'have the right to obtain from the national law of each State the legal status appropriate to the proper exercise of their

[1] Inter-American Development Bank, Art. I, Section 2.
[2] *United Nations Treaty Series*, vol. 1, p. 15; see also ibid., vol. 33, p. 261.
[3] *Recueil des cours*, 101 (1960–III), p. 173.
[4] Ibid., 84 (1953–III), p. 300.

functions inside each country'.[1] On the other hand, Dr. Brownlie seems to suggest[2] that it is general opinion that 'there is as yet no customary rule supporting international immunities'.

The problem becomes even more elusive when it is realized that what applies, probably, to the United Nations and its Agencies and, possibly, to the general body of international organizations does not necessarily apply to international corporations. For there is no doubt that their functions could almost always be performed with equal efficiency by corporations formed under municipal law and having the member States as its shareholders. It is, for instance, difficult to see why the Inter-American Development Bank could not have been created in the form of such a corporation, though it would have been less convenient and might have necessitated special arrangements with the host State about taxation and similar matters. But these are considerations which in a non-member State will carry very much less weight.

In such a State the international corporation of the type contemplated in this paper has no function requiring its immunity. Its status should not be different from that of a national corporation with States as shareholders. In countries in which the law confers immunity only upon international entities in respect of their acts done *jure imperii* the result should not be in doubt. In other countries it should be borne in mind that there is no existing rule of international law requiring immunity; that as a matter of legal policy there is, in view of the nature and functions of an international corporation, no need for any—and certainly no justification for a general—immunity; and that none of the old maxims which have given birth to a largely obsolete doctrine apply in the case of international corporations. Thus, there is no room for the maxim *par in parem non habet jurisdictionem*, for an international corporation is not on a *par* with a State. Nor can it be suggested that the dignity or independence of an international corporation is such as to permit the doctrine to be invoked.

Even if the immunity of an international corporation could be justified in a limited field, for instance, in regard to legal proceedings, it would not in any event lend itself to generalization. If the Inter-American Development Bank made investments in the United Kingdom there would be no rational ground for suggesting that it should be exempt from taxation or exchange control.[3]

[1] *International Institutions* (London, 1958), p. 232.

[2] *Principles of Public International Law*, p. 523.

[3] This presupposes that no Order-in-Council under the Act mentioned above, p. 170, n. 1, has been made. It may be expected that in most cases the much-extended power to make an Order-in-Council will be exercised. Accordingly the problem discussed in the text is, in the United Kingdom, unlikely to arise except in respect of international corporations which have only international organizations as members, or in respect of immunities which Schedule 1, Part I, of the Act does not sanction, such as the immunity of assets and the immunity from exchange control.

It is submitted, therefore, that in non-member States and in the absence of special treaty arrangements or legislation, an international corporation should not be entitled to any immunities or privileges.

IX

The principal submissions developed in this paper may be summarized as follows:

1. An international corporation in the true sense of the word is a body corporate created by treaty.

2. Though the status of an international corporation so defined is not in every respect the same as that of a State, it is, in general, subject only to international law. Accordingly,

(*a*) it has no nationality;

(*b*) it has no seat, domicile or residence in the sense of municipal law, but

(*c*) as an international person it will, in general, require recognition in the same way as a State.

3. The status of an international corporation in municipal law, at any rate in non-member States, is determined, in accordance with the general rule of the conflict of laws, by the personal law; this can only be public international law.

4. Accordingly, even in a municipal court public international law answers the question whether the body corporate exists as a legal person.

5. Furthermore, public international law determines the international corporation's corporate status, that is to say, such questions as whether and to what extent the member States are responsible for the corporation's liabilities, whether the corporation may purchase its own shares, what the effects of insolvency or amalgamation are.

6. Again, public international law determines, even in a municipal court, the question of the international corporation's capacity, i.e. the question whether an act is or is not *ultra vires* the corporation.

7. Finally, even in a municipal court, public international law determines the authority of the officials acting on behalf of the international corporation.

8. While in member States the immunities and privileges of an international corporation will almost invariably be defined by the terms of the treaty creating it, in non-member States the international corporation does not, in the absence of special treaties or legislation, enjoy any such immunities or privileges at all.

ENFORCEMENT ACTION BY REGIONAL AGENCIES, WITH SPECIAL REFERENCE TO THE ORGANIZATION OF AMERICAN STATES*

By DR. MICHAEL AKEHURST
Lecturer in Law, Manchester University

PART I

INTRODUCTORY

The San Francisco Conference

THE relationship between the United Nations and regional arrangements was second only to the question of voting procedure in the Security Council as a source of bitter argument at the San Francisco Conference, which indeed at one time came close to breaking up over regional arrangements. Many delegations, particularly that of the United States, were split internally over this question.[1]

Some States feared that the United Nations would be weakened if enforcement action could be taken under regional arrangements, without the authorization of the Security Council. It was argued that smaller States might become so involved in regional matters that they would lose interest in the United Nations, and that regional arrangements might become power blocs or military alliances under the hegemony of great powers, which would quarrel with one another and acquire enough strength to defy the United Nations itself.

However, there were three groups of States which were determined to gain special privileges for the regional arrangements to which they were parties.

The first and biggest group consisted of the Latin American States, who, together with the United States, had signed the Act of Chapultepec shortly before the San Francisco Conference, placing inter-American collective security on a more effective footing than ever before.[2] The Latin

* © Dr. Michael Akehurst, 1968

[1] I. L. Claude, 'The O.A.S., the U.N. and the United States', *International Conciliation*, 547 (March 1964), pp. 4–15.

[2] The Charter of the Organization of American States, signed in 1948, must be read in conjunction with the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro in 1947 (which replaced and strengthened the Act of Chapultepec), and with the American Treaty on Pacific Settlement, 1948 (otherwise known as the Pact of Bogotá, which has, however, only been ratified by about half the members of the O.A.S.). But these three treaties merely represented the culmination of sixty years of inter-American institutional co-operation.

On 27 February 1967 the members of the O.A.S. signed the Protocol of Buenos Aires, which is intended to alter the provisions of the O.A.S. Charter concerning the organs of the O.A.S., and to add new articles dealing with economic and social questions. The Protocol has not yet

Americans had relatively little interest in extra-hemispheric affairs; their main concern was to build up inter-American institutions as a means of preventing intervention by extra-hemispheric powers, and of inducing the United States (which participated in all the major inter-American institutions) to submit to majority decisions and the rule of law.[1] As small powers, the Latin Americans were jealous of great power dominance in the Security Council, and were determined to delete the requirement that enforcement action under regional arrangements should be subject to authorization by the Security Council, which, they claimed, would enable an extra-regional great power to veto regional action and generally to interfere with regional affairs. After a prolonged deadlock, a compromise was finally reached with the insertion of Article 51 in the Charter, which would enable States, including regional groupings of States, to act in collective self-defence without Security Council authorization.

Secondly, certain European States had concluded bilateral treaties for their mutual protection against Germany.[2] The anxieties of these States were met by the adoption of amendments which removed the necessity of Security Council authorization for action taken in certain circumstances against ex-enemy States.[3]

Thirdly, the Arab States wanted to strengthen the League of Arab States, which had just been set up; but at the same time they also wanted to define regional arrangements narrowly so as to exclude military alliances which might be used by non-Arab powers to keep the Arabs in subjection. To this end the Egyptian delegation tabled the following amendment to the draft of the Charter:

> There shall be considered as regional arrangements organizations of a permanent nature grouping in a given geographical area several countries which, by reason of their proximity, community of interests or cultural, linguistic, historical or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise between them and for the maintenance of peace and security in their region, as well as for the safeguarding of their interests and the development of economic and cultural relations.[4]

The Egyptian amendment was rejected in Committee III/4 by 29 votes to 5, ostensibly on the grounds that it was pointless and superfluous; but in all probability the real but unstated reason for its rejection was that other

entered into force but, even when it does, it will have no effect on the substance of the present study, apart from altering the numbering of the articles of the O.A.S. Charter. References to such articles in the present study are based on the original numbering adopted in 1948.

[1] J. C. Dreier, *The O.A.S. and the Hemisphere Crisis* (1962), pp. 20–1; B. Wood and M. Morales, 'Latin America and the United Nations', *International Organization*, 19 (1965), p. 714.

[2] e.g. the Anglo-Soviet, Franco-Soviet, Czech-Soviet and Yugoslav-Soviet Mutual Assistance Pacts of 26 May 1942, 10 December 1944, 13 December 1943 and 12 April 1945, respectively.

[3] Articles 53 and 107 of the U.N. Charter.

[4] *U.N.C.I.O.*, vol. 12, p. 850.

States were afraid that it would exclude 'regional' arrangements which they had created or intended to create, such as the anti-Axis Mutual Assistance Pacts. At all events, none of the non-Arab States expressed any agreement with the contents of the amendment, so it is hardly possible to regard it as an authentic interpretation of the term 'regional arrangement'.

What is a regional agency?—theory and practice

Article 52 (1) of the United Nations Charter provides:

> Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

No other conditions are laid down; thus, there is nothing to prevent a non-member of the United Nations or an ex-enemy State from becoming a party to a regional arrangement.[1] The difference between an agency and an arrangement would appear to be that an agency possesses an institutional superstructure (e.g. the O.A.S.), whereas an arrangement does not (e.g. the Anglo-Soviet Mutual Assistance Pact). In other words, an agency is simply a more highly developed form of an arrangement, and in the present study 'arrangement' is used to include 'agency'.

According to Article 52 (1) a regional arrangement or agency (i) must be concerned with the maintenance of international peace and security, (ii) must be consistent with the purposes and principles of the United Nations, and (iii) must in some way be 'regional'. This last requirement is the only one which poses any difficulties of interpretation. 'Regional' is interpreted liberally; thus the Anglo-Soviet Mutual Assistance Pact against Germany is a regional arrangement. But the word cannot be wholly devoid of meaning, so that an arrangement between two States at opposite ends of the earth, for instance, although presumably not contrary to the Charter, could not possibly be regarded as regional.

Some writers try to define regional arrangements in ways which to a greater or lesser extent resemble the amendment unsuccessfully tabled by the Egyptian delegation at San Francisco.[2] This resemblance is enough by itself to cast doubt on such definitions because, as already explained, the Egyptian amendment ran counter to the views held by the majority of States represented at San Francisco. There is nothing in the text of

[1] Hans Kelsen, *The Law of the United Nations* (1950), pp. 319–20; R. Yakemtchouk, *L'O.N.U.: la sécurité régionale et le problème du régionalisme* (1955), pp. 147–8. Jordan joined the League of Arab States before joining the United Nations.

[2] Yakemtchouk, op. cit., pp. 139–77.

the Charter, the *travaux préparatoires*,[1] or the practice of the United Nations to justify such restrictive definitions, which would have the effect of denying the status of regional arrangements to those arrangements which did not comply with a whole string of 'implied conditions'. Moreover, all such restrictive definitions break down because they would exclude the mutual-assistance pacts against former enemy States, which are expressly mentioned in Article 53 of the Charter as an example of regional arrangements. Many of these pacts had come into force before the San Francisco Conference, so that the States represented at the Conference could not have been ignorant of their terms, and there is nothing to indicate that the Conference intended to define a regional arrangement in one way if it was directed against a former enemy State, and to define it in another way if it was directed elsewhere.

It is commonly supposed by writers that an arrangement which meets the requirements of a regional arrangement, whatever they may be, must automatically be regarded as a regional arrangement, governed by the provisions of Chapter VIII of the Charter, whether the parties to the arrangement desire this result or not. There might be some truth in this view if the Charter laid down a precise definition of regional arrangements. But the Charter does not, nor has any United Nations organ ever given such a definition, so the only way in which one can be *certain* that an arrangement is covered by Chapter VIII of the Charter is to see whether the parties to the arrangement have claimed that it is a regional arrangement, and whether this claim has been accepted in practice by the United Nations. This is perfectly consistent with the spirit of the San Francisco Conference, where States were concerned with claiming privileges for the *particular* regional arrangement to which they happened to be parties, not with defining and promoting regional arrangements *in general*. There is no indication that an arrangement is rendered contrary to the Charter by the mere fact that it is not 'regional' within the meaning of Chapter VIII—the Commonwealth is a clear example of an arrangement which must, on any definition, be regarded as non-regional. And, as we shall see, there is not much difference between the powers of a regional agency and the powers of a non-regional agency, so it is not surprising that it has seldom proved necessary in practice to decide whether a particular arrangement or agency is regional or not.[2] Indeed, there are cases where the parties to an arrangement have strenuously denied that it is subject to Chapter VIII of the Charter.[3]

[1] Apart from Senator Vandenberg's 'personal observation' that a simple military alliance could not qualify as a regional arrangement (*U.N.C.I.O.*, vol. 12, p. 860). But the mutual assistance pacts against former enemy States, which are mentioned in the Charter as regional arrangements, were no more than military alliances.

[2] See below, pp. 181–3.

[3] e.g. N.A.T.O.; see below, p. 179.

One organization that is clearly a regional agency is the Organization of American States. This is expressly stated in Article 1 of its Charter, and has been accepted from the beginning by the United Nations. The Charter of Addis Ababa, which set up the Organization of African Unity in 1963, does not contain a similar term, but its *travaux préparatoires* make it clear that the Organization was intended to be a regional agency within the meaning of the United Nations Charter,[1] and a number of United Nations resolutions expressly refer to it as such.[2]

The League of Arab States is more problematical. In some of its own resolutions it has regarded itself as a regional agency;[3] but, when the General Assembly was deciding whether to give the League a permanent invitation to send an observer to General Assembly sessions, Israel argued that the League was not a regional arrangement because, *inter alia*, its activities were allegedly aggressive and therefore not consistent with the purposes and principles of the United Nations, as required by Article 52 of the Charter. In the end the General Assembly issued the invitation without passing upon the status of the League.[4] Three years later, however, when the Security Council was discussing the Lebanese crisis of 1958, the consensus in the Council seemed to be that the League was a regional agency within the meaning of the Charter.[5]

Military alliances such as N.A.T.O. and the Warsaw Pact have also proved a source of controversy in the past. The Brussels Treaty of 1948 and the North Atlantic Treaty of 1949 were based on Article 51 of the Charter,[6] and the parties to those treaties always denied that they were subject to Chapter VIII of the Charter. The Soviet Union argued that the treaties were not in accordance with Article 51, and that they could only be justified, if at all, under Chapter VIII. The advantages of this interpretation from the Soviet point of view, and its disadvantages for the Western States, are obvious; N.A.T.O. would have been unable to act without authorization from the Security Council (subject to the Soviet veto), and defence plans would have had to be disclosed in advance to the

[1] José Antonio de Yturriaga, 'L'Organisation de l'Unité Africaine et les Nations Unies', *Revue générale de droit international public*, 36 (1965), pp. 370, 378.

[2] e.g. the Security Council Resolutions of 30 December 1964 (S/6129) and 20 November 1965 (S/6955).

[3] e.g. Resolution no. 290 of 1 April 1950, quoted in M. Khalil, *The Arab States and the Arab League* (1962), vol. 2, p. 147.

[4] *Repertory of United Nations Practice*, vol. 2, pp. 446–8.

[5] *Repertoire of the Practice of the Security Council* (1956–8), pp. 186–7. For further views on the status of the League of Arab States, see M. Khadduri, 'The Arab League as a Regional Arrangement', *American Journal of International Law*, 40 (1946), pp. 756, 770; M. Moushkeli, 'La ligue des états Arabes', *Revue générale de droit international public*, 17 (1946), pp. 112, 153; Kamāl al-Ghāli, *Mīthāq Jāmi 'at al-Duwal al-'Arabīyah* (1948), pp. 162–3; R. W. Macdonald, *The League of Arab States* (1965), pp. 12, 29, 245–9.

[6] This is expressly stated in Article 4 of the Brussels Treaty (renumbered Article 5 in 1954) and in Article 5 of the North Atlantic Treaty.

Security Council (including the Soviet representative) under Article 54.[1]

Until 1955 the Soviet Union's bilateral treaties of alliance with other Eastern European States provided, with minor variations in phraseology, that, 'should either of the High Contracting Parties become involved in hostilities either with Germany, in consequence of her renewed policy of aggression, *or with any other State joining Germany directly or in any other way in such a policy*, the other High Contracting Party will at once give the High Contracting Party so involved in hostilities all the military and other assistance in its power'. It is submitted that the words placed in italics in the text above are enough to remove the treaties from the scope of the provisions in Articles 53 and 107 of the Charter, which permit action to be taken under regional arrangements against former enemy States without the authorization of the Security Council. Be that as it may, when the Soviet system of collective security was placed on a multilateral basis in 1955, it was based, like N.A.T.O., on Article 51 of the Charter.[2] Since then, no more has been heard of the Soviet argument that N.A.T.O. is subject to Chapter VIII of the Charter. There therefore seems to be a tacit agreement that Article 51 should receive a wide interpretation, and that activities valid under Article 51 do not also need to conform with Chapter VIII. However, this is not to exclude the possibility that an organization like N.A.T.O. might assume subsidiary functions which could be regarded as subject to Chapter VIII, such as settling disputes among its members; the question is not whether an organization *is* a regional agency, but whether it is *functioning* as one *in a given situation*; some of its functions may fall under Article 51 and others perhaps under Chapter VIII.[3]

Attempts have been made from time to time by States to class other organizations or agreements as regional arrangements—for instance, the Suez Canal Users' Association[4] and the Treaty of Zürich, 1960—but none of them has been pressed very far.[5]

[1] Julius Stone, *Legal Controls of International Conflict* (revised ed., 1959), pp. 247–51, 260–1.

[2] Article 51 is expressly invoked in Article 4 of the Warsaw Pact (text in *American Journal of International Law*, 49 (1955), Supplement, pp. 194–9). See W. W. Kulski, 'The Soviet System of Collective Security Compared with the Western System', ibid. 54 (1960), p. 453.

[3] Asbjørn Eide, 'Peace-keeping and Enforcement by Regional Organizations', *Journal of Peace Research*, 3 (1966), pp. 125, 127, 138–9; Bin Cheng, in *Yearbook of World Affairs* (1957), p. 354. And see below, pp. 184 and 213.

[4] Lord Avon, *Full Circle* (1960), p. 449.

[5] Thus, in March 1964, when Turkey argued that the Treaty of Zürich was a regional arrangement (S/5596 of 13 March 1964), Cyprus replied that, if so, Turkish military intervention in Cyprus required Security Council authorization under Article 53 of the Charter (*S.C.O.R.*, 19th year, 1103rd meeting, 13 March 1964, pp. 43–5). Since then, Turkey does not seem to have referred to Chapter VIII again; for instance, when the Security Council resumed discussion of the Cyprus question in August 1964, Turkey evaded the problem of the validity of the Treaty of Zürich altogether, and concentrated on allegations that the Greek Cypriots were endangering the lives of Turkish Cypriots, etc. (ibid., 1142nd meeting, 8 August 1964, pp. 8–15, 27–9; 1143rd meeting, 9–11 August 1964, pp. 9–11, 13, 33–9, 58).

Why has the practice of the United Nations not produced a clear definition of regional arrangements?

The practice of the organs of the United Nations has not produced a clear definition of regional arrangements, and the reason lies largely in the fact that the powers of regional arrangements under the Charter are not very different from those of other arrangements. This may seem surprising in view of the disputes at San Francisco about regionalism, but it should be remembered that the claims of supporters of different regional arrangements were satisfied, not by conferring privileges on all regional arrangements as such, but by writing the right of collective self-defence into the Charter (a right which is in no way the monopoly of regional arrangements), and by permitting regional arrangements to dispense with Security Council authorization in certain circumstances when acting against former enemy States—a power which, contrary to expectations, turned out to be almost wholly irrelevant to the post-war world.

Chapter VIII of the Charter contains three articles—Article 52 on peaceful settlement of disputes, Article 53 on enforcement action and Article 54 on reports to the Security Council.

As regards peaceful settlement of disputes, the practice of the United Nations has varied. At the time of the overthrow of the Arbenz regime in Guatemala in 1954, the United States argued that the Security Council had no jurisdiction to discuss a Guatemalan complaint until Guatemala had exhausted the corresponding machinery of the O.A.S.; and the United States succeeded in its contention, to the extent that the motion to put the Guatemalan complaint on the agenda failed to receive the necessary seven affirmative votes. But since then the practice of the Security Council has become more flexible; the existence of unused regional machinery is no longer a bar to the Security Council's jurisdiction, but simply constitutes one of the many factors to be taken into account by the Security Council when it decides *in its discretion* whether or not to place a matter on its agenda.[1] But, when exercising this discretion, the Security Council is also entitled to pay some attention to the existence of unused *non-regional* machinery for pacific settlement, for such machinery, it is submitted, constitutes 'other peaceful means of their own choice' which parties to a dispute are expected to use under Article 33 of the Charter. Where failure to use regional machinery can have the same effects as failure to use non-regional machinery, it is hardly surprising that no effort has been devoted to distinguishing between regional and non-regional arrangements.

[1] I. L. Claude, 'The O.A.S., the U.N. and the United States', *International Conciliation*, 547 (March 1964), pp. 21–46; E. Jiménez de Arechaga, 'La Coordination des systèmes de l'O.N.U. et de l'O.E.A. pour le règlement pacifique des différends et la sécurité collective', *Recueil des cours* 111 (1964), pp. 423, 426–52. During the Dominican Republic crisis of 1965, the Security Council sent observers to the Republic while O.A.S. mediators were still at work; see below, p. 209.

Nor is there much difference between regional and non-regional arrangements when it comes to enforcement action. It is true that regional arrangements possess certain advantages in the case of enforcement action against former enemy States—Article 53 is wider than Article 107—but, as will be explained later,[1] it is unlikely that any State *acting in good faith* would rely on those provisions nowadays. In other cases regional agencies may take enforcement action either to give effect to Security Council decisions, or to give effect to their own decisions (Article 53), whereas other groups of States may only take enforcement action to give effect to Security Council decisions (Article 48); but, since the Security Council must in all cases order or authorize the action, the difference is not very great. Indeed, it is striking how seldom Article 53 has been invoked by the members of regional agencies. The League of Arab States, in its struggles against Zionism, and the Organization of African Unity, in its struggles against the remnants of 'white power' in southern Africa, have never justified their acts by reference to their status as regional agencies; they have argued in terms of self-defence, and of the right to use force to protect their 'kith and kin', to eliminate colonialism, etc.[2] Reliance on Article 53 would mean that their action would require Security Council authorization, and that their plans would have to be disclosed to the Security Council in advance under Article 54; it would also tend to imply *a contrario* that individual States would be unable to act on their own outside the framework of the regional agencies; so it is only natural that they have not relied on Article 53.

The only organization which has been involved in serious argument about Article 53 is the O.A.S., whose members have done their best to interpret Article 53 in such a way as to minimize Security Council control, during a chiastic series of crises in the Caribbean—the Dominican Republic (1960), Cuba (early 1962), the Cuban Missiles Crisis (autumn 1962) and the Dominican Republic (1965). Inevitably, therefore, the present

[1] See below, pp. 184–5.

[2] In 1948 Syria claimed that the League of Arab States was pacifying a local dispute in Palestine under Article 52 (*S.C.O.R.*, 3rd year, 299th meeting, 21 May 1948, pp. 13–15); but using force against a party to a dispute without his consent obviously cannot constitute peaceful settlement of that dispute, and it is no wonder that no more was heard of this curious argument.

On the Arab States' justification for using force in Palestine, see *S.C.O.R.*, 3rd year, 301st meeting, 22 May 1948, pp. 7–8; *Repertoire of the Practice of the Security Council* (1946–51), pp. 449–50; ibid. (1952–5), pp. 161–2; ibid. (1956–8), pp. 173–4; R. W. Macdonald, *The League of Arab States* (1965), pp. 227–9. See also C. J. R. Dugard, 'The Organization of African Unity and Colonialism', *International and Comparative Law Quarterly*, 16 (1967), p. 157. On the right to use force against colonialism, see Ian Brownlie, *Principles of International Law* (1966), pp. 418, 485, and General Assembly Resolution 2105 (XX) of 20 December 1965, which 'calls upon the colonial Powers to discontinue their policy of violating the rights of colonial peoples through the systematic influx of foreign immigrants and the dislocation, deportation and transfer of the indigenous inhabitants' (paragraph 5) and 'invites all States to provide material and moral assistance to the national liberation movements in colonial territories' (paragraph 10).

study is largely devoted to an examination of those four crises. The members of the O.A.S. had their own reasons for relying on Chapter VIII of the Charter;[1] but their actions were bound to cause cold-war disputes at the United Nations, since the United States was a member of the O.A.S., which was regarded by the Soviet Union as being entirely dominated by the United States. However, it may be noted at the present stage that the types of action which the members of the O.A.S. claimed to be able to take, without Security Council authorization, could also, by an extension of the reasoning used by the supporters of the O.A.S., be taken in the same way by any other group of States, regional or otherwise[2]—so, once again, it makes little difference whether or not an agency is regarded as regional within the meaning of Chapter VIII of the Charter.

Article 54 of the United Nations Charter provides: 'The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.' The words 'maintenance of international peace and security' echo the words 'to maintain international peace and security' in Article 1 (1), which defines them as covering both enforcement action and peaceful settlement of disputes. Regional 'activities' which are to be reported to the Security Council would therefore seem to include both activities under Article 53 (enforcement action)[3] and activities under Article 52 (peaceful settlement of disputes).[4] It might consequently be thought that one could tell whether an arrangement or agency was 'regional' within the meaning of Chapter VIII by seeing whether its activities were reported to the Security Council, for this is a duty which the Charter does not impose in the case of other types of arrangement or agency. But the O.A.S. is the only organization which has conscientiously observed Article 54. The League of Arab States and the Organization of African Unity have only submitted reports sporadically, and there have been no reports at all on other arrangements or agencies. What is more, the Security Council has never protested against non-performance of Article 54. As a result, compliance with Article 54 has become virtually optional in practice, and certainly provides no guide for distinguishing between regional and non-regional arrangements.

[1] See below, pp. 222 et seq.

[2] See below, pp. 195–6 and 213. Some, but not all, of the arguments used to defend the O.A.S. action during the Cuban missiles crisis are probably not capable of extension to non-regional agencies in the same way, but it is submitted that those arguments are legally doubtful in any case (see below, pp. 201–3 and 216–19).

[3] Bentwich and Martin, *A Commentary on the Charter of the United Nations* (1950), p. 115. See also Article 5 of the Inter-American Treaty of Reciprocal Assistance, 1947 (the 'Rio Treaty').

[4] See the Security Council Resolution of 30 December 1964 (S/6129). The O.A.S. has always reported its activities in the field of peaceful settlement of disputes.

Topics omitted from the present study

The present study is only concerned with the interpretation of Article 53 of the Charter. It is not concerned with collective self-defence, a right which is possessed, not only by regional agencies, but also by other groups of States. When a regional agency acts in collective self-defence, its actions are governed by Article 51, not by Articles 52–4. When determining the applicability of Articles 52–4, it is necessary to look, not only at the nature of the organization, but also at the nature of *each* of its *functions*. There is nothing to prevent a body like the O.A.S., whose main functions are governed by Articles 52–4, from acquiring subsidiary functions which are governed solely by Article 51,[1] just as a body like N.A.T.O., created under Article 51 of the Charter, may acquire subsidiary functions which are governed solely by Articles 52–4.[2] The distinction has important practical effects, because action under Article 51 does not need Security Council authorization and may be reported *ex post facto*, whereas enforcement action under Article 53 does normally require such authorization and is (in theory) to be reported *in advance* under Article 54.

Nor is it intended to say anything about the problems which would arise if the Security Council decided to use regional arrangements or agencies for enforcement action under its own authority.[3] Although this is provided for in Article 53, it has more affinity with the general contents of Chapter VII than with the special legal and political problems which arise when a regional agency takes the initiative in wishing to act and needs to know the limits of the Security Council's control over its actions.

Finally, it is not proposed to discuss the provisions of the Charter about former enemy States, except incidentally, when they throw light on more general problems affecting all regional arrangements. This is partly, but not entirely, for reasons of space. The provisions about former enemy States raise excruciating problems of interpretation, which have already received as much elucidation from other commentators as they can ever hope to obtain.[4] Moreover, although the letter of those provisions does not support a confident assertion that they are no longer applicable, the

[1] Note the references to Article 51 in Articles 3 and 7 of the Inter-American Treaty of Reciprocal Assistance, 1947 (the 'Rio Treaty').

[2] See above, p. 180, and see D. W. Bowett, *Self-Defence in International Law* (1957), pp. 222 et seq. In the same way, a regional agency's functions in fields other than the maintenance of international peace and security (e.g. economic or cultural questions) are not contrary to the Charter, but are not governed by Chapter VIII; thus, they would not be reportable under Article 54.

[3] Jiménez de Arechaga, loc. cit. (above, p. 181, n. 1), pp. 453–4; Yakemtchouk, op. cit. (above, p. 177, n. 1), pp. 156–8.

[4] Stone, op. cit. (above, p. 180, n. 1), pp. 251–3; Jiménez de Arechaga, loc. cit. (above, p. 181, n. 1), pp. 458–60; Kelsen, op. cit. (above, p. 177, n. 1), pp. 805–15; Yakemtchouk, op. cit. (above, p. 177, n. 1), pp. 114–15, 184–6; Goodrich and Hambro, *Charter of the United Nations* (2nd edition, 1949), pp. 316–18, 530–6.

intention at San Francisco was that they should not remain in force for ever, and a State which invoked those provisions today, a generation after the end of hostilities, when the world situation has profoundly altered, would surely be regarded as acting in bad faith. Since 1955 these provisions have ceased to be used as a legal basis for military alliances.[1] Although they were referred to in United Nations debates during the early post-war years, they were used, not to justify enforcement action against former enemy States, but in an unsuccessful attempt to deny the competence of the United Nations to consider complaints brought by its founder-members—an obvious distortion of the purpose of Article 107. Furthermore, the acts which gave rise to the complaints, and for which immunity from United Nations scrutiny was being sought, were not acts against former enemy States, but acts by one founder-member against others (viz. the Berlin blockade, 1948), or even breaches of peace treaties by the former enemy States themselves.[2] Similarly in 1968 the Soviet Union began to threaten West Germany again under the 'enemy States clauses', but this was simply a clumsy attempt to justify (or to divert attention from) the Soviet invasion of Czechoslovakia—an invasion which could not be justified under those clauses, since Czechoslovakia was not a former enemy State.

PART II

Enforcement Action and Non-military Sanctions

The Charter provisions

Article 53 of the Charter states that no enforcement action may be taken by regional agencies or under regional arrangements without the authorization of the Security Council. What does 'enforcement action' mean? Does it refer only to military action, or does it include non-military sanctions as well? This question received little attention for many years, but formed the centre of disputes over the O.A.S. sanctions against the Dominican Republic in 1960, and against Cuba at the beginning of 1962.

Article 53 does not define 'enforcement action'. However, these words are used elsewhere in the Charter, in Articles 2 (5) and 5; Articles 2 (7) and 50 use the expression 'enforcement measures', which probably has the same meaning.[3] All of these provisions, with the exception of Article

[1] See above, p. 180.

[2] *Repertoire of the Practice of the Security Council* (1946–51), pp. 498–9; *Repertory of United Nations Practice*, vol. 5, pp. 387–95.

[3] For an ingenious argument to the contrary, see R.-J. Dupuy, 'Organisation internationale et unité politique: la crise de l'Organisation des Etats américains', *Annuaire français de droit international*, 6 (1960), pp. 185, 212. Articles 2 (5), 2 (7) and 50 also speak of 'preventive action' or 'preventive measures'; Kelsen, *The Law of the United Nations* (1950), p. 92, citing the *travaux préparatoires* of the Charter, shows that preventive action is simply a species of enforcement action, designed to remove threats to the peace before they become breaches of the peace.

53, contemplate action by the Security Council, not by regional agencies. Sanctions which the Security Council may impose are listed in Articles 41 (non-military sanctions) and 42 (military sanctions). Assuming, therefore, for the sake of argument that 'enforcement action' in Article 53 has the same meaning as similar expressions in other provisions of the Charter, it will be possible to interpret Article 53 by seeing whether or not those other provisions contemplate action under Article 41 as well as action under Article 42.

The *travaux préparatoires* indicate that *all* action under Chapter VII is enforcement action.[1] This view is also taken by a number of writers, notably Kelsen, Rama, Paolillo and Ruda.[2]

Some of the arguments used by these authors are interesting. Thus, Ruda argues that Article 50—which provides that a State, facing economic problems as a result of enforcement action against another State, shall have the right to consult the Security Council with regard to a solution of those problems—must apply to action under Article 41, because the economic problems caused for third States by economic sanctions will be no less than those caused by military sanctions.

Rama submits that it would be absurd for members to be allowed to aid States against whom the United Nations was taking non-military sanctions, while being forbidden by Article 2 (5) to aid States subject to provisional measures or military sanctions; but this argument loses much of its force if one removes provisional measures from the category of enforcement action.[3]

Ruda and Paolillo both argue that to treat non-military sanctions as not constituting enforcement action would mean that the Security Council, if confronted with a threat to the peace arising from matters within the domestic jurisdiction of a State, would be able to take military action, but not other sorts of action, since the only exception to the principle of non-intervention in matters of domestic jurisdiction is, according to Article 2

[1] *U.N.C.I.O.*, vol 11, pp. 20, 24; note also that Committee III/3's report on what subsequently became Articles 41–50 was entitled 'Mechanism of Enforcement Measures' (ibid., vol. 12, p. 508). However, it is arguable that the provisional measures mentioned in Article 40 are not enforcement action, and the two types of measures are distinguished from each other ibid., pp. 505–8. If provisional measures did constitute enforcement action, a State which had been called upon to comply with provisional measures could be suspended from exercising the rights and privileges of membership under Article 5, and this would be incompatible with the principle laid down in Article 40, that 'such provisional measures shall be without prejudice to the rights, claims or position of the parties concerned'. Jiménez de Arechaga therefore argues, loc. cit. (above, p. 181, n. 1), pp. 465–6, that regional agencies may impose provisional measures without Security Council authorization, since provisional measures are not enforcement action within the meaning of Article 53. This seems sound, but would not give the regional agency much power, because provisional measures are temporary and without prejudice to the rights, etc. of the parties.

[2] Kelsen, *The Law of the United Nations* (1950), p. 724; Rama, in *Anuario Uruguayo de Derecho Internacional* (1962), p. 386; Paolillo, ibid., pp. 234–6; Ruda, ibid., pp. 48–9.

[3] See above, n. 1 on this page.

(7), that it 'shall not prejudice the application of enforcement measures under Chapter VII'; and they point out that this result would be contrary to the intentions of Article 42, which treats military action as something more drastic than other types of sanction, something which is only to be applied 'should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate'. However, this argument is based on the premise that the proviso about enforcement measures at the end of Article 2 (7) should be interpreted literally, whereas in fact United Nations practice is quite different. In the early years, it is true, the proviso was interpreted fairly literally, and 'enforcement measures' were regarded as covering action under Article 41 as well as Article 42.[1] But the more recent practice has been to interpret the proviso more loosely, in the sense that the occurrence of any of the jurisdictional facts of Chapter VII (threat to the peace, breach of the peace or act of aggression) is enough to remove the matter from the domestic jurisdiction of any State, so that the Security Council may act, not only under Chapter VII, but also under Chapter VI.[2] This approach makes it unnecessary for the Security Council to define 'enforcement measures'. Similarly, the practice concerning Articles 2 (5), 5 and 50 has been too sparse to produce any evidence of the proper interpretation of 'enforcement action'.

So far we have been working on the assumption that 'enforcement action', when taken by regional agencies, has the same meaning as 'enforcement action' taken by the Security Council. But this assumption is of limited value, since different parts of the Charter were drafted by different committees at San Francisco. One or two statements made at San Francisco indicate that Article 53 was intended to include non-military sanctions within the concept of enforcement action,[3] but the Uruguayan delegate thought otherwise.[4] Actually, little attention was paid to defining enforcement action at San Francisco; delegates spent most of their time trying to define the exceptional circumstances in which action could be taken without Security Council authorization. Indeed, it has been contended[5] that those exceptional circumstances (self-defence, and action against former enemy states) contemplate military action, and that therefore the general principle forbidding enforcement action without Security Council

[1] *Repertory of United Nations Practice*, vol. 1, pp. 151–2; *Repertoire of the Practice of the Security Council* (1946–51), pp. 453–4, 456–9, 462–7, 474–5.

[2] Ibid. (1959–63), pp. 299–303.

[3] See the Venezuelan statements in *U.N.C.I.O.*, vol. 4, pp. 265–6, and vol. 12, p. 783 ('military, economic and other sanctions'), and the Brazilian drafting amendment in vol. 4, p. 829, which was never put to the vote. (At least, it *looks* like a drafting amendment; one would hardly expect a Latin American State to wish to *increase* the Security Council's control over pan-American institutions.)

[4] Ibid., vol. 1, p. 327.

[5] Jiménez de Arechaga, loc. cit. (above, p. 181, n. 1), pp. 479–80.

authorization must also have been framed with nothing but military action in mind; but this argument is not conclusive, since action to forestall a renewal of aggressive policy by a former enemy state, for instance, need not *necessarily* be military.

During the negotiations leading up to the Inter-American Treaty of Reciprocal Assistance (the 'Rio Treaty', 1947), many members of the O.A.S. submitted drafts which treated non-military sanctions as enforcement action requiring Security Council authorization.[1] However, the Colombian statesman Lleras Camargo, who had been Chairman of the Committee at San Francisco which had dealt with regional arrangements, and who had subsequently become Secretary-General of the O.A.S., took a different view. He did not argue that 'enforcement action', when taken by regional agencies, meant something different from 'enforcement action' taken by the Security Council; instead, he said that a restrictive interpretation of the words in Article 53 justified a similar interpretation of the words in other parts of the Charter—the exact reverse of the approach adopted by those writers who rely on an extensive interpretation of the words in other parts of the Charter in order to justify an extensive interpretation of the words in Article 53. Lleras Camargo's analysis reads like a summary of the arguments used by the supporters of O.A.S. sanctions against the Dominican Republic and Cuba half a generation later:

> La différence entre les mesures de l'art. 41, qui ne sont pas coercitives, étant donné qu'elles n'impliquent aucun des éléments de violence physique qui caractérisent l'action militaire, et celles de l'art. 42 ressort nettement de la lecture de la Charte. Les mesures coercitives, impliquant le recours à la force physique, sont indiscutablement du ressort exclusif du Conseil de Sécurité, avec une seule exception: la légitime défense . . . Mais il n'en est pas ainsi des mesures prévues à l'art. 41; on peut même dire que tout État a le droit, sans violer pour autant les buts, les principes ou les dispositions de la Charte, de rompre ses relations diplomatiques, consulaires ou économiques, ou d'interrompre ses communications avec un autre État.[2]

The O.A.S. sanctions against the Dominican Republic, 1960—the facts.[3]

On 20 August 1960 the O.A.S. imposed sanctions on the Dominican Republic for having organized subversive activities against the Government of Venezuela, including the attempted assassination of the Venezuelan President Betancourt. Under the Treaty of Rio de Janeiro, 1947, all O.A.S.

[1] I. L. Claude, 'The O.A.S., the U.N. and the United States', *International Conciliation*, 547 (March 1964), pp. 50–1.

[2] *Rapport du Secrétaire général de l'O.E.A. sur la Conférence de Rio de Janeiro* (1947), pp. 22 et seq.

[3] G. Connell-Smith, *The Inter-American System* (1966), pp. 244–50; Jerome Slater, 'The United States, the O.A.S. and the Dominican Republic 1961–1963', *International Organization*, 18 (1964), pp. 268–91; I. L. Claude, 'The O.A.S., the U.N. and the United States', *International Conciliation*, 547 (March 1964), pp. 48–53.

members were under a duty to carry out the sanctions, which consisted of the severance of diplomatic relations, and a partial embargo on exports to the Dominican Republic, beginning with military equipment. Later, in 1961, the embargo was extended to include petroleum, petroleum products and lorries, and was not lifted until after the assassination of General Trujillo, the dictator of the Dominican Republic, on 30 May 1961.

The O.A.S. reported its action to the Security Council under Article 54 of the Charter on 1 September 1960.[1] Four days later the SovietUnion moved that the Security Council should approve the O.A.S. measures which, it argued, constituted enforcement action within the meaning of Article 53 and therefore needed Security Council authorization to render them lawful.[2] The United States had yielded rather reluctantly to the desires of Venezuela and other democratic Latin American States for sanctions against the right-wing dictatorship of Trujillo, in the hope that those democratic States would in turn support the United States in voting for sanctions against the Castro regime in Cuba at a later stage, and the Soviet Union was anxious not to permit the development of a precedent which would justify O.A.S. economic sanctions against Cuba without Security Council approval. Conversely, the United States, which argued that the words 'enforcement action' in Article 53 only referred to military action and not to the severance of diplomatic and economic relations, proposed, in conjunction with Argentina and Ecuador, that the Security Council should merely 'take note' of the O.A.S. action.[3]

The Security Council devoted three meetings to the question of the Dominican Republic.[4] The United Kingdom, China, Italy, Tunisia and Venezuela (which was participating in the debate by invitation, as an interested party) supported the United States' interpretation of Article 53, although only the United Kingdom and Venezuela seemed absolutely confident of the correctness of that interpretation. France, Argentina and Ecuador supported the United States on political grounds (e.g. by stressing the desirability of regional autonomy) but regarded the legal issue as being more or less open. Poland followed the Soviet interpretation. Ceylon thought that the Soviet interpretation was probably correct, but, in view of the uncertainty of the legal position, and out of deference to Latin American views, was prepared to vote for the draft resolution tabled by the United States and its two allies, on the understanding that the words 'takes note of' meant 'concurs with'.

In the end the Security Council passed the draft resolution tabled by the United States, Argentina and Ecuador, by 9 votes to 0, with 2 abstentions

[1] S/4476, 1 September 1960; text in Connell-Smith, op. cit., p. 247.
[2] *S.C.O.R.*, 15th year, Supplement for July, August and September 1960 (S/4477, 5 September 1960, and S/4481/Rev. 1, 8 September 1960).
[3] Ibid. (S/4484, 8 September 1960).
[4] *S.C.O.R.*, 15th year, 893rd to 895th meetings, 8–9 September 1960.

(Poland, U.S.S.R.).[1] The Soviet draft resolution was thereupon withdrawn without a vote.

What is striking about the debates is the uncertainty expressed about the legal issues involved. The Soviet Union, after the vote, seized upon these expressions of uncertainty as evidence that the Security Council had left the legal position open and had not created a precedent; indeed, the Soviet Union even argued that the Council, by taking note of the O.A.S. action without expressing disapproval, had implicitly approved it and thereby established its competence to give or withhold approval.[2] The United States, on the other hand, regarded the vote as a clear vindication of its legal position.[3] Both views seem rather exaggerated. Eight members of the Council leant towards the United States position, but few of them shared the United States' certainty about the legal issues involved.

The O.A.S. sanctions against Cuba, January 1962—the facts[4]

In January 1962 the O.A.S. decided that the aims and principles pursued by the Government of Cuba, which had proclaimed its Marxist-Leninist allegiance, were incompatible with the aims and principles of the inter-American system, and suspended the Cuban Government (not the State of Cuba) from participation in the O.A.S. The O.A.S. also placed an embargo on exports of arms to Cuba, as a sanction against Cuba for having fomented subversive activities in other Latin American countries, particularly Venezuela.[5]

In February 1962 Cuba complained to the General Assembly about United States intervention in Cuban affairs. The O.A.S. sanctions were mentioned in the debates, but little of any significance was said about Article 53 of the United Nations Charter. Draft resolutions tabled by Czechoslovakia, Roumania and Mongolia, which were either expressly or by implication critical of the United States, were rejected.[6]

On 22 February 1962 Cuba complained to the Security Council specifically about the O.A.S. sanctions.[7] However, on 27 February the Security

[1] *S.C.O.R.*, 15th year, 895th meeting, 9 September 1960, p. 5. [2] Ibid., p. 5. [3] Ibid., p. 2.

[4] I. L. Claude, 'The O.A.S., the U.N. and the United States', *International Conciliation*, 547 (March 1964), pp. 53 et seq.

[5] *S.C.O.R.*, 17th year, Supplement for January, February and March 1962 (S/5705, 3 February 1962). Later, these sanctions were intensified. In 1964 the O.A.S. ordered severance of diplomatic and almost all economic relations with Cuba (Modesto Seara Vazquez, 'La neuvième réunion de consultation des Ministres des Affaires Étrangères et l'affaire du Cuba', *Annuaire français de droit international*, 10 (1964), p. 638). In 1967 the O.A.S. ordered its members to impose a partial boycott on all ships, regardless of nationality, which traded with Cuba, and appealed to non-members of the O.A.S. to co-operate in imposing economic sanctions on Cuba (*The Times*, 26 September 1967, pp. 4, 19 and 21).

[6] *G.A.O.R.*, 16th Session, 1961–2, 1st Committee, pp. 436–7; ibid., Plenary Meetings, vol. 3, pp. 1358, 1362.

[7] *S.C.O.R.*, 17th year, Supplement for January, February and March 1962 (S/5080).

Council decided not to place the Cuban complaint on its agenda; Ghana, Roumania, the Soviet Union and the United Arab Republic voted in favour of placing the complaint on the agenda, and the other seven members abstained, mainly on the grounds that the complaint was a vexatious repetition of the charges which had just been dismissed by the General Assembly. The United States and the Soviet Union restated the attitudes which they had adopted during the debates on the Dominican Republic in 1960, except that this time the Soviet Union argued that the O.A.S. sanctions were contrary to the United Nations and O.A.S. Charters and should not be approved; the United States, together with the United Kingdom, Chile and Venezuela, argued that the precedent established in 1960 made it clear that the O.A.S. sanctions did not require Security Council authorization.[1]

On 8 March 1962 Cuba returned to the Security Council with a request that the Council should seek an advisory opinion from the International Court of Justice on seven questions concerning the legality of the O.A.S. sanctions, including the question whether the sanctions were enforcement action and subject to Security Council authorization within the meaning of Article 53.[2] Cuba also asked the Security Council to order suspension of the sanctions while the case was *sub judice*. This time there were no objections to the matter's being placed on the agenda, and the Council discussed the Cuban request from 14 to 23 March 1962.[3] The Cuban request was rejected by 7 votes to 2 (Roumania, Soviet Union), with 1 abstention (United Arab Republic); Ghana did not participate in the voting. Paragraph 3 of the Cuban request, which concerned the meaning of enforcement action, was defeated by 7 votes to 4 in a separate vote.

Roumania, the Soviet Union and Cuba (which was participating by invitation) argued that the O.A.S. sanctions were illegal on a large number of grounds, including the absence of Security Council authorization under Article 53. The United Arab Republic said nothing about the correct interpretation of Article 53. Ghana said that the Dominican Republic affair had left the correct interpretation of Article 53 unsettled, and was therefore inclined to support reference of the question to the International Court of Justice. However, both the United States and the Soviet Union invoked the Dominican Republic incident as conclusive proof of the correctness of their respective positions. In arguing that Security Council authorization was not needed for non-military sanctions, the United States was

[1] *S.C.O.R.*, 17th year, 991st meeting, 27 February 1962.

[2] *S.C.O.R.*, 17th year, Supplement for January, February and March 1962 (S/5086, 8 March 1962). It is unusual to find Communist States supporting applications to the International Court of Justice, but Cuba was Latin American first, and Communist second, and the Latin Americans have always had a high regard for judicial settlement of international disputes.

[3] *S.C.O.R.*, 17th year, 992nd to 999th meetings.

supported by Chile, China, France, Ireland, the United Kingdom and Venezuela, many of whom quoted the Dominican Republic incident in support of their arguments. Moreover, the support given to the United States' position was not qualified in the same way as the support which it had received in 1960.

However, the arguments in the Security Council were political as much as legal. Alarming pictures were painted of the dangers of allowing regional agencies to be shackled by the veto in the Security Council, and on the other side equally alarming pictures were painted of the dangers of allowing regional agencies to persecute unpopular neighbours without being subject to Security Council control. It was this political flavour in the debates which enabled the United States and its six allies to argue that the Cuban questions should not be put to the Court, since they raised political and not legal issues. (Another reason advanced for voting against the Cuban request was that the law on Article 53 was so clear, especially after the Dominican Republic incident in 1960, that it did not need interpretation by the International Court of Justice.)

The legality of the O.A.S. sanctions under the Rio Treaty

Although the present study is concerned with the interpretation of Article 53 of the United Nations Charter, some of the arguments put forward concerning Article 53 cannot be understood unless a few words are said about the legality of the O.A.S. sanctions under the Rio Treaty.

The sanctions were imposed under Article 6 of the Rio Treaty, which authorizes the O.A.S. to take certain action 'if the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America'. There is a long O.A.S. practice indicating that these words cover the instigation of subversive activities against neighbouring countries, the acts of which the Dominican Republic and Cuba were accused; indeed, such acts are an endemic feature of Caribbean politics.[1]

However, in previous cases the O.A.S. had merely dispatched fact-finding missions, ordered cease-fires and called upon the parties to refrain from provocative action. It was only in 1960 and in 1962 that it imposed sanctions. Moreover, those sanctions were kept in force for a very long time. It is therefore possible to argue, as Mexico did when the O.A.S. extended its economic sanctions against Cuba in 1964, that the sanctions were illegal because they were not being used to counteract a present threat,

[1] Ann van Wynen Thomas and A. J. Thomas (junior), *Non-Intervention* (1956), pp. 189–95; William Manger, *Pan-America in Crisis* (1961), pp. 49–55.

as intended by Article 6 of the Rio Treaty, but to punish past threats.[1] Of course, the two things merge into one another when there is a danger of the threats being repeated; but the indefinite maintenance of economic sanctions can be attacked on a slightly different ground, namely, that it gives rise to the suspicion that the sanctions are being used for the ulterior motive of securing the downfall of the government of the State concerned. Needless to say, this was the main burden of the Cuban complaints against the O.A.S.,[2] and no doubt the same criticism could have been made about the sanctions against the Dominican Republic,[3] although the Trujillo regime's unpopularity was so great that no one said anything in its favour at the Security Council, and even the regime itself did not try to defend itself before the Council.

At least the O.A.S. treated Trujillo and Castro alike, so that no one can accuse it of favouring right-wing dictatorships at the expense of left-wing dictatorships, or vice versa. And if it treated both types of dictatorship more severely than democratic regimes, it could argue from experience that the mere existence of a dictatorship can endanger international peace.[4] Ideological dictatorships often try to spread their ideologies by subversion, and other dictatorships turn to subversion (as Trujillo did) in order to eliminate governments in neighbouring States whom they suspect, rightly or wrongly, of plotting their overthrow. Attempts by the inhabitants to overthrow a dictatorship may result in civil war, which can easily lead to international war, for instance as a result of participation by political opponents who have been exiled to other countries (which frequently give them assistance).

In addition to imposing economic sanctions on Cuba in January 1962, the O.A.S. suspended the Castro government from participation in the O.A.S. on the grounds that its Marxist-Leninist ideology was incompatible with the inter-American system.[5] Cuba naturally said that the suspension was illegal because its choice of government was a matter solely within its domestic jurisdiction, but other Latin American States argued that Communism, as practised by Cuba, constituted a violation of the principles

[1] Modesto Seara Vazquez, loc. cit. (above, p. 190, n. 5), p. 645.

[2] *S.C.O.R.*, 17th year, 992nd meeting, 14 March 1962, paragraphs 19–59 and 93–7. See also the Soviet statement at the 991st meeting, 27 February 1962, paragraphs 55–6. The Cuban case was aided by the fact that the O.A.S. suspension of the Castro government's right to participate in the O.A.S., on the grounds of its Communist affiliations, had been decided upon at the same time as the economic sanctions, which were based upon Cuba's subversive activities.

[3] R. T. Bohan, 'The Dominican Case: Unilateral Intervention', *American Journal of International Law*, 60 (1966), pp. 809, 811. See also the Soviet statement, *S.C.O.R.*, 15th year, 894th meeting, 9 September 1960, paragraphs 61–2, and the United States statement, ibid., 20th year, 1196th meeting, 3 May 1965, paragraph 60.

[4] T. Covey Oliver in *The Inter-American Security System and the Cuban Crisis* (1962), pp. 20–2; F. V. García-Amador, *The Inter-American System* (1966), pp. 56–7, 63.

[5] Text of O.A.S. resolution in *American Journal of International Law*, 56 (1962), pp. 601, 610–12.

concerning representative democracy and human rights enshrined in the O.A.S. Charter,[1] so that the suspension of the Castro government was justified by a variation on the doctrine of discharge through breach, or by the doctrine of implied powers possessed by international organizations.[2] (Indeed, the suspension had to be justified on such grounds, since there was no express provision for it in the O.A.S. Charter—a fact which provided Cuba with another argument for challenging the decision's validity.)[3]

The United States and its friends argued that decisions by regional agencies concerning their membership and the interpretation of their constituent instruments were final and not subject to review by the Security Council—an interesting extension of the doctrine of domestic jurisdiction from States to international organizations. As the Irish delegate put it:

> To be effective, regional organizations must have common aims. They must have a minimal degree of internal cohesion, a basic sense of common purpose. To deny regional organizations the freedom to exclude from the privilege of membership Governments or States which, for one reason or another, seem to the other members to have ceased to subscribe to the aims and ideals shared by the membership as a whole would be to deprive regional organizations of the sense of community of interest and purpose which is the main reason for their existence, and by so doing, to reduce the whole concept of regional organization to a nullity.[4]

The legality of the O.A.S. sanctions under Article 53 of the United Nations Charter.

The Communist States argued that all sanctions imposed by a regional agency constituted 'enforcement action';[5] that sanctions might only be

[1] Preamble and Article 5. The States which used this argument admitted that the Castro government was not the first undemocratic regime in Latin America, but they said that other Latin American countries with dictatorships acknowledged democracy as an ideal and were only temporarily prevented from giving effect to it; Cuba, on the other hand, had embraced an ideology which even rejected democracy as an ideal. This explanation might suggest that lip service to democracy is more important than its practice, but it must be remembered that Latin Americans often have a turn of mind which is theoretical rather than practical. In any case, the fact that other dictatorships had escaped punishment is not a legal justification for denying the power of the O.A.S. to act against Cuba.

[2] *G.A.O.R.*, 16th Session, 1961–2, 1st Committee, pp. 369–438; C. G. Fenwick, editorial comment in *American Journal of International Law*, 56 (1962), pp. 469, 474; F. V. García-Amador, *The Inter-American System* (1966), p. 198; L. B. Sohn, 'Expulsion or forced withdrawal from an international organization', *Harvard Law Review*, 77 (1964), pp. 1381–1425; United States statement in *S.C.O.R.*, 17th year, 993rd meeting, 15 March 1962, paragraphs 108–9.

[3] Ibid., 17th year, 992nd meeting, 14 March 1962, paragraphs 62–6, 73–85 and 101–4.

[4] Ibid., 996th meeting, 21 March 1962, paragraph 62. See also the statements by the United States (993rd meeting, 15 March 1962, paragraphs 100–2) and the United Kingdom (995th meeting, 20 March 1962, paragraph 15).

[5] Kelsen was cited in support of this proposition. 'This purpose [of non-military sanctions] is defined in Article 41 as follows: "to give effect to its [the Security Council's] decisions"; that means to enforce the decision upon a recalcitrant State. Hence these measures, too, may be considered to be "enforcement measures" . . .' (Kelsen, *The Law of the United Nations* (1950), p. 724; *S.C.O.R.*, 15th year, 894th meeting, 9 September 1960, paragraph 57). Poland argued that 'enforcement action' in Article 53 referred *only* to *non-military* action, so that a regional agency could not take military action even with the approval of the Security Council (ibid.,

imposed in order to deal with a threat to the peace, a breach of the peace or an act of aggression (and not, for instance, in order to bring about the downfall of a Communist government in Cuba); and that they might not be imposed without the authorization of the Security Council.[1]

The United States and its allies, on the other hand, maintained that 'enforcement action', necessitating Security Council authorization, referred only to military action, and that a regional agency could employ any non-military sanctions it liked, without Security Council authorization, against a member which presented a threat to the peace or which broke the rules of the organization. A number of arguments were put forward in support of this contention.

Firstly, it was said that enforcement naturally connoted force. Thus Chile, after using some rather unconvincing semantic arguments about the true meaning of 'enforcement' and '*coercitives*', pointed out that Article 45 of the Charter employed the words 'international enforcement action' in a context which could only refer to military action.[2]

Secondly, it was urged that this interpretation reflected the basic principle of the Charter that military force was the monopoly of the Security Council and could not be used by States except in self-defence. It was only natural, then, that Security Council authorization was needed before regional agencies could use force, because otherwise it would be too easy to evade Article 2 (4). But there was no corresponding reason why regional agencies should need Security Council authorization to do things which any State could lawfully do on its own.[3]

This brings us to the third and principal argument used by the supporters of the O.A.S.—that any State is at liberty to break off economic relations with another State at will,[4] and that groups of States are entitled to do the

paragraph 33). But there is no other authority for this proposition, which is wholly at variance with the legislative history of Article 53.

During the civil war in the Dominican Republic in 1965, Malaysia argued that 'enforcement action' meant military or non-military means employed to give effect to a binding decision, as opposed to a recommendation (*S.C.O.R.*, 20th year, 1222nd meeting, 9 June 1965, paragraphs 107–8). This is an echo of the questionable arguments put forward by the State Department lawyers at the time of the Cuban missiles crisis, but the State Department lawyers drew a distinction between binding decisions and recommendations only in the context of military action (see below, p. 202). So Malaysia was in a minority of one in suggesting this interpretation of Article 53.

The Soviet Union said that suspension from the O.A.S. constituted enforcement action, although not expressly listed in Article 41, because Article 41 states: 'The Security Council may decide what measures . . . are to be employed. . . . These may *include* . . .' (after which there is a list of examples: italics added); *S.C.O.R.*, 17th year, 991st meeting, 27 February 1962, paragraph 57.

[1] Ibid., 15th year, 894th meeting, 9 September 1960, paragraphs 15 and 56; 17th year, 991st meeting, 27 February 1962, paragraph 48.

[2] *S.C.O.R.*, 17th year, 994th meeting, 16 March 1962, paragraphs 65–7.

[3] See the United Kingdom statement ibid., 15th year, 893rd meeting, 8 September 1960, paragraphs 96–7.

[4] What if there is a treaty providing for the maintenance of economic relations? No objection

same on a concerted basis, whether the groups are regional or not.[1] (Indeed, one might add that to regard such acts by regional agencies as needing Security Council authorization would have the absurd result of debarring regional groups of States from doing that which non-regional groups were at liberty to do.)

The Soviet representative attempted to counter this argument by saying that action by a group of States (especially a regional group) was different from action by a single State, because its consequences were more drastic.[2] But, quite apart from the fact that this argument overlooks the distinction between a difference in degree and a difference in kind, its major premise is false; action by a powerful State, such as the United States, can have much more drastic results than action by a group of weak States.

There is one other possible argument in support of the O.A.S. position

on this score was made during the United Nations debates, but difficulties do arise from Articles 15 and 16 of the O.A.S. Charter, which provide:

'Article 15. No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

'Article 16. No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.'

Ann van Wynen Thomas and A. J. Thomas (junior), *Non-Intervention* (1956), pp. 139–40, interpret these articles as forbidding all forms of economic retorsion or reprisals, and even as preventing States from giving aid on a conditional basis, or threatening to raise their tariffs against States which refuse to reduce their own tariffs to a reasonable level (pp. 409–14). They do, however, recognize elsewhere (Thomas and Thomas, *The Organization of American States* (1963), pp. 366–8) that a State is entitled to disregard Articles 15 and 16 in its relations with another State which has itself broken the O.A.S. Charter.

The authors cite no authority for this interpretation. Indeed, what is known of the original intentions of the parties to the treaty certainly does not confirm it. See W. Sanders, 'The Bogotá Conference', *International Conciliation*, 442 (1948), pp. 383, 392: C. G. Fenwick, 'The Ninth International Conference of American States', *American Journal of International Law*, 42 (1948), pp. 553, 556.

It seems more reasonable to regard the 'interference or attempted threat' in Article 15 as contemplating nothing less than *domination* over a State's personality, or over its political, economic or cultural elements. Similarly, Article 16 prohibits 'coercive measures of an economic or political character' only if they are designed *both* 'to force the sovereign will of another State' (i.e. to undermine its sovereignty) *and* to 'obtain from it advantages of any kind'; the word 'advantages' presumably refers to something more than the normal outcome of international bargaining—it contemplates advantages of an unequal or imperialist character. See the statement by the Dominican Republic's representative, *G.A.O.R.*, 16th Session, 1961–2, 1st Committee, p. 397, paragraphs 6–7.

[1] See the United States speech in *S.C.O.R.*, 17th year, 993rd meeting, 15 March 1962, paragraph 113, and the Chinese speech, ibid., 995th meeting, 20 March 1962, paragraph 24.

[2] Ibid., 998th meeting, 23 March 1962, paragraph 38. This is particularly so when the regional agency can, like the O.A.S., take binding decisions by a majority vote.

Asbjørn Eide, 'Peace-keeping and Enforcement by Regional Organizations,' *Journal of Peace Research*, 3 (1966), pp. 125, 141, presents a slightly more effective argument: 'It often happens in municipal law that action which can legally be done by an individual becomes illegal when done collectively and in an organized way.' But in English law, at any rate, something more is needed before such an act becomes illegal; it must be done by unlawful means, or for an unlawful or malicious purpose. See the definitions of conspiracy in H. Street, *The Law of Torts* (3rd ed., 1963), p. 354, and Kenny's *Outlines of Criminal Law* (18th ed., 1962), paragraph 448.

which was not mentioned during the Security Council debates. Under Article 11 (2) of the United Nations Charter, as interpreted in the *Expenses* case,[1] the General Assembly cannot take enforcement action; the Security Council is the only United Nations organ which has that power. But the General Assembly has, from the beginning, claimed the right to recommend members to break off diplomatic or economic relations with particular States.[2] If the General Assembly passes such a recommendation and members comply with it, no one would suggest that they are thereby infringing the Security Council's monopoly of enforcement action and acting illegally. Why, then, should States not be able to comply with a similar recommendation made by a regional agency of which they are members? Moreover, members can agree in advance to accept General Assembly resolutions as binding,[3] so as to empower the General Assembly to *order* them to break off diplomatic or economic relations with another State. If they can agree to confer such powers on the General Assembly, without infringing the Security Council's monopoly of enforcement action, why cannot they confer similar powers on a regional agency?

PART III

Enforcement Action and the Use of Force— The Cuban Missiles Crisis

The facts

On 22 October 1962 President Kennedy announced that the Soviet Union was installing nuclear missiles in Cuba for offensive purposes, and demanded the immediate withdrawal of the missiles. At the same time he called for urgent meetings of the O.A.S. and the Security Council to deal with the threat presented by the missiles.

On the following day the O.A.S. met and resolved:

1. To call for the immediate dismantling and withdrawal from Cuba of all missiles and other weapons with any offensive capability;

2. To recommend that the member States, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance,[4] take all measures, individually and

[1] *I.C.J. Reports*, 1962, p. 151.

[2] e.g. Resolution 391 (I) of 12 December 1946, aimed against Spain, and Resolution 2054 (XX) of 22 October 1965, concerning trade with South Africa.

[3] *Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne* (1925), *P.C.I.J.*, Series B, No. 12, pp. 26–9; *Railway Traffic between Lithuania and Poland* (1931), ibid., Series A/B, No. 42.

[4] See above, p. 192. Clearly the missiles constituted a 'fact or situation that might endanger the peace of America', within the meaning of Article 6 of the Treaty, if (but only if) one accepts the United States belief about the aggressive purpose of the missiles. The presence of the missiles would not only have made it far easier for the Soviet Union to circumvent the American early warning system and launch a nuclear attack on any point in the Western hemisphere; their presence would also have made Castro bolder in his attempts to subvert other Latin American governments, safe in the knowledge that they would not dare to retaliate militarily against Cuba while it had nuclear weapons on its territory.

collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet Powers military material and related supplies which may threaten the peace and security of the Continent, and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent;

3. To inform the Security Council of the United Nations of this resolution in accordance with Article 54 of the Charter of the United Nations, and to express the hope that the Security Council will . . . despatch United Nations observers to Cuba. . . .[1]

All members of the O.A.S. voted for this resolution (with the exception of Cuba, whose government had been suspended from participation in the O.A.S. nine months earlier; the Uruguayan representative did not vote for the resolution until he had obtained instructions from his government the following day). Brazil, Mexico and Bolivia abstained in a separate vote on the last twenty-four words of paragraph 2, which could be interpreted to justify bombardment of the missile sites or an invasion of Cuba—the United States wanted to keep these options open in case the quarantine was not enough to secure the removal of the existing missiles from Cuba.

An hour or two after the passing of the O.A.S. resolution, President Kennedy issued a proclamation, in which, relying expressly on the O.A.S. resolution, he announced that the United States was imposing a quarantine on Cuba; all ships found carrying arms to Cuba would be forced to turn back.[2] Argentina, the Dominican Republic and Venezuela helped the United States in enforcing the quarantine, and Colombia, Costa Rica, El Salvador, Guatemala, Haiti, Honduras and Nicaragua placed their ports and aerodromes at the disposal of the States taking an active part in the quarantine.

Simultaneously with the request for an O.A.S. meeting, the United States asked for a meeting of the Security Council and tabled a draft resolution calling for (i) the withdrawal from Cuba of all missiles and offensive weapons, as a provisional measure under Article 40 of the United Nations Charter; (ii) the dispatch of United Nations observers to Cuba to report on compliance with the resolution; (iii) termination of the quarantine, *after* the missiles had been withdrawn; and (iv) negotiations between the United States and the Soviet Union.[3]

The Soviet Union and Cuba also requested a meeting of the Security Council, arguing that the missiles were intended for defensive purposes (e.g. deterring a United States invasion of Cuba); the United States action, they alleged, infringed the freedom of the seas, was an act of war

[1] Text in *S.C.O.R.*, 17th year, 1022nd meeting, 23 October 1962, paragraph 81.

[2] Text in *American Journal of International Law*, 57 (1963), p. 512. The United States also treated the O.A.S. resolution (and earlier resolutions) as justifying United States aerial reconnaissance over Cuba, which would normally have been contrary to the principle of territorial sovereignty over air space. See Q. Wright, 'The Cuban Quarantine', ibid., pp. 546, 547–8.

[3] Text in *S.C.O.R.*, 17th year, 1022nd meeting, 23 October 1962, paragraph 80.

contrary to Article 2 (4) of the Charter, formed a prelude to a United States invasion of Cuba, and increased the risks of thermonuclear war. In reply the United States said that the aggressive purpose of the missiles was proved by the secrecy and deceit with which the Soviet Union had tried to upset the nuclear balance of power. In the end the Soviet Union withdrew the missiles in return for a United States promise not to invade Cuba, whereupon the United States lifted the quarantine.

As a general rule, the Security Council debates on the missiles crisis contain few arguments of a legal nature;[1] the universal desire was to solve the crisis, not to indulge in recriminations about the rights and wrongs of the situation. However, the State Department's legal advisers subsequently published legal justifications of the quarantine.[2] These are not *ex post facto* rationalizations; all the evidence suggests that legal considerations did play an important part in the original decision-making.[3] And the surprising thing is that the approach of the State Department lawyers was totally different from the approach adopted by the vast majority of academic writers on the subject.

The legality of the quarantine

The quarantine presents some problems of legal classification. Far from being a term of art, the word had only been used once before in the sense attributed to it by the United States Government—by President Roosevelt in 1937, as part of his contingency planning during the Sino-Japanese war.[4] But it seems clear that the quarantine constituted a 'threat or use of force' within the meaning of Article 2 (4) of the United Nations Charter—a threat, that is, to use force against ships which resisted the quarantine. Indeed, the State Department lawyers admitted this point.[5]

[1] But see ibid., 1024th meeting, 24 October 1962, paragraphs 107–9, where Ghana argued that the quarantine entailed the use of force and therefore constituted enforcement action which could not be taken without Security Council approval.

[2] L. C. Meeker, 'Defensive Quarantine and the Law', *American Journal of International Law*, 57 (1963), p. 515; Abram Chayes, 'Law and the Quarantine of Cuba', *Foreign Affairs*, 41 (1963), p. 552.

[3] See the Soviet statement in *S.C.O.R.*, 17th year, 1023rd meeting, 24 October 1962, paragraph 50; T. Covey Oliver, 'International Law and the Quarantine of Cuba', *American Journal of International Law*, 57 (1963), pp. 373, 374; L. Henkin, 'International Law and the Behaviour of Nations', *Recueil des cours*, 114 (1965), pp. 171, 253 et seq.; H. M. Pachter, *Collision Course: the Cuban Missile Crisis and Coexistence* (1963), pp. 28–31. See also the conflicting remarks by Abram Chayes and Dean Acheson in the *Proceedings of the American Society of International Law* (1963), pp. 10–11 and 14. Acheson, who believed that international law was irrelevant when a nation's vital interests were at stake, had been one of President Kennedy's advisers at an early stage of the crisis, but his omission from the informal group of advisers before the climax of the crisis may not have been unconnected with the extremeness of his views (Elie Abel, *The Missiles Crisis* (1966), pp. 64–5, 72–3, 87–9).

[4] Jiménez de Arechaga, loc. cit. (above, p. 181, n. 1), p. 486, who suggests that President Kennedy used the word because it sounded less 'belligerent' than 'blockade'.

[5] Meeker, loc. cit. (in n. 2 on this page), p. 523. Consequently it is impossible to argue, as some writers do, that the quarantine was justified simply because it was *sui generis* and unprecedented,

Article 2 (4) of the United Nations Charter prohibits 'the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. Granted that the quarantine amounted to at least a threat of force, it can only be justified by saying either that it was not 'against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations', or that it was covered by one of the exceptions to Article 2 (4) contained elsewhere in the Charter.[1]

Some writers tried to justify the quarantine by a restrictive interpretation of Article 2 (4).[2] But this view was not adopted by the State Department lawyers,[3] and was attacked by other academic writers.[4] It is submitted that the type of restrictive interpretation of Article 2 (4) which was used to justify the quarantine is incompatible with the spirit of the preamble and of Articles 1 and 2 (3) of the Charter; besides, the *travaux préparatoires* indicate that the reference to territorial integrity, political independence and the purposes of the United Nations was added to Article 2 (4) in an endeavour to strengthen it, not to weaken it.[5]

On the assumption that the quarantine was contrary to the general principle of Article 2 (4), we can only justify it by finding an exception to that principle. The exception which occurred to many writers was Article

or because it constituted a peaceful settlement of a dispute, or because it amounted to no more than an 'interruption of . . . sea . . . communication' within the meaning of Article 41 of the Charter (which surely, however, contemplates boycott, not interference with other States' shipping). (For references, see Jiménez de Arechaga, loc. cit. (above, p. 181, n. 1), pp. 486–9.)

[1] Note that Article 2 (4) speaks of 'force', not 'war'. It is therefore pointless to argue that the quarantine was a pacific blockade, as opposed to an act of war; even if classical international law permitted pacific blockades, which is doubtful, they are now outlawed by Article 2 (4) (Wright, loc. cit. (above, p. 198, n. 2), pp. 554–6).

[2] E. Seligman, 'The Legality of U.S. Quarantine Action under the U.N. Charter', *American Bar Association Journal*, 49 (1963), p. 142; B. MacChesney, 'Some Comments on the "Quarantine" of Cuba', *American Journal of International Law*, 57 (1963), pp. 592, 596; J. Mallison, 'Limited Naval Blockade or Quarantine Interdiction', *George Washington University Law Review*, 31 (1962), pp. 339, 382.

[3] Meeker, loc. cit. (above, p. 199, n. 2), p. 523, in effect interprets the words 'in any . . . manner inconsistent with the Purposes of the United Nations' to mean 'not authorized by any other provision of the United Nations Charter'—which is reasonable.

[4] Q. Wright, loc. cit. (above, p. 198, n. 2), pp. 556–7; Henkin in *Proceedings of the American Society of International Law* (1963), pp. 166–7; Giraud in *Revue générale de droit international public*, 34 (1963), p. 523; Jiménez de Arechaga, loc. cit. (above, p. 181, n. 1), pp. 489–92.

[5] L. Oppenheim, *International Law* (7th ed. by H. Lauterpacht, 1952), vol. 2, pp. 153–4. It is also submitted that the point of these words was to prohibit force against *States*. Isolated acts of force against merchant ships on the high seas, for instance in the case of hot pursuit or under the doctrine of the *Caroline* incident, 1841 (J. B. Moore, *A Digest of International Law* (1906), vol. 2, pp. 409–14), are not prohibited. But where force is used or threatened against ships on a large scale, with the intent of altering a State's policy, as in the Cuban missiles crisis, it counts as force against a State and is prohibited in principle by Article 2 (4). Article 6 of the North Atlantic Treaty provides that an attack against a party's ships or aircraft shall be regarded as an attack against that party (and therefore as an attack against all the parties).

51, which, by an extensive interpretation to cover anticipatory self-defence, seemed to offer the most obvious justification for the quarantine.[1] But other writers maintained (rightly, it is submitted) that the quarantine could not be justified by the idea of anticipatory self-defence, which was contrary to Article 51; the words 'if an armed attack occurs' in Article 51, they argued, meant that the right of self-defence did not accrue until the very moment when the armed attack occurred.[2] At all events, the State Department lawyers did not rely on Article 51; on the contrary, Chayes went out of his way to emphasize that the United States had *not* invoked Article 51.[3]

Instead of relying on Article 51, the State Department lawyers relied on another 'exception' to Article 2 (4)—Chapter VIII. Indeed, President Kennedy's proclamation had referred expressly to the O.A.S. resolution, which had in turn referred expressly to Article 54 of the United Nations Charter. The difficulty about relying on Chapter VIII, of course, was the principle in Article 53 forbidding regional enforcement action without Security Council authorization, and the State Department lawyers resorted to various arguments to get round this difficulty.

Thus, Chayes[4] regarded the O.A.S. action as the logical extension of the principle of regional autonomy which the O.A.S. had claimed when

[1] Christol and Davis, 'Maritime Quarantine', *American Journal of International Law*, 57 (1963), pp. 525, 531–6; Fenwick, 'The Quarantine against Cuba: Legal or Illegal?', ibid., pp. 588 et seq.; MacChesney, 'Some Comments on the "Quarantine" of Cuba', ibid. pp. 592, 595–7; McDougal, 'The Soviet-Cuban Quarantine and Self-Defense', ibid., pp. 597–604; Seligman, loc. cit. (above, p. 200, n. 2), pp. 143–4; Mallison, loc. cit. (above, p. 200, n. 2), p. 353.

[2] Wright, loc. cit. (above, p. 198, n. 2), pp. 559–63; Henkin in *Proceedings of the American Society of International Law*, 57 (1963), pp. 150–2, 165–9; Rahmatullah Khan, 'Cuban Quarantine and the Charter of the United Nations', *Indian Journal of International Law*, 4 (1964), pp. 107, 120–3; Jiménez de Arechaga, loc. cit. (above, p. 181, n. 1), pp. 500–8; Windass, 'The Cuban Crisis and World Order', *International Relations*, 3 (1966), pp. 1, 5–6.

[3] Loc. cit. (above, p. 199, n. 2), p. 554. See below, pp. 223 et seq., for an attempt to explain why Chayes emphasized this point.

Christol and Davis, loc. cit. (in n. 1 on this page), pp. 534–5, quote various official United States statements about the necessity of defending the United States against a threat to its security; but the statements, which are not legal in tone, would appear to indicate the motive for the action rather than its legal basis. These two things are not the same; thus, a man's motive for divorcing his wife may be because he wants to marry someone else, but the legal grounds on which he relies will be adultery, cruelty, etc.

F. V. García-Amador, *The Inter-American System* (1966), pp. 164–5, says that the Cuban quarantine was not a collective action by the O.A.S., but an exercise of self-defence by its members. In support of this thesis, he quotes a previous O.A.S. resolution and an O.A.S. press release, both of which are quoted in the preamble to the resolution of 22 October 1962; but, read carefully, the earlier resolution and the press release are equally compatible with the idea that the resolution was based on Chapter VIII of the United Nations Charter. He also points out that the O.A.S. merely *recommended* the use of force, and did not take a binding *decision* to apply measures; but this was because, under Article 20 of the Rio Treaty, O.A.S. resolutions concerning the use of force are the only resolutions concerning sanctions which cannot be binding on member States. Actually, if García-Amador were correct, one would expect the O.A.S. resolution of 22 October 1962 to refer to Article 3 of the Rio Treaty and Article 51 of the United Nations Charter; instead, it refers to Articles 6 and 8 of the Rio Treaty and Article 54 of the United Nations Charter.

[4] Loc. cit. (above, p. 199, n. 2), p. 556.

imposing sanctions on the Dominican Republic in 1960 and on Cuba in January 1962.[1] He cited these two incidents as examples of the tendency to define 'enforcement action' restrictively, ignoring the fact that the reason given for not treating the O.A.S. sanctions as enforcement action in those two cases was that *they did not entail the use of force*, but constituted acts which any State might lawfully do on its own.[2]

No doubt realizing that the earlier cases could be distinguished on these grounds, the State Department lawyers used a more specific argument, namely, that 'enforcement action' meant action taken under a binding decision, not under a recommendation; and the O.A.S. resolution of 22 October 1962 had only been a recommendation.

In support of this view, Meeker[3] cites the advisory opinion given by the International Court of Justice in the *Expenses* case. But, in that opinion, the Court treated U.N.E.F. and O.N.U.C. as not constituting enforcement action because they operated with the consent of the States concerned;[4] the Court's distinction between enforcement action and peace-keeping action was not based on the distinction between a decision and a recommendation, but on the presence or absence of consent by the States concerned. Cuba, the Soviet Union and other maritime powers did not consent to the quarantine.

The results produced by the State Department's lawyers may perhaps be thought to prove too much; under Article 20 of the Rio Treaty, O.A.S. resolutions for the use of force can never be more than recommendations, which, on Meeker's argument, would mean that they were never subject to Security Council authorization. Moreover, the argument is somewhat illogical; 'what the United States is putting forward is the curious proposition that what is illegal if it be done under obligation become [*sic*] lawful if it be done voluntarily'.[5]

Meeker's argument is also illogical in that it overlooks the fact that Chapter VIII applies not only to regional agencies but also to regional arrangements (i.e. regional agreements which create rights and duties for the parties, but which do not create separate institutions). The distinction between directed and recommended action only makes sense if there is an organ of an international organization passing resolutions. One cannot define 'enforcement action' by reference to institutional procedures which are present in regional agencies and absent from regional arrangements. Moreover, application of this definition to the functions of the Security Council would mean that military sanctions imposed by the Security Council under Article 42 could not constitute enforcement action, since

[1] See above, pp. 188–97.
[2] See above, pp. 195–7.
[3] Loc. cit. (above, p. 199, n. 2), pp. 521–2.
[4] *I.C.J. Reports*, 1962, pp. 151, 170, 177.
[5] G. I. A. D. Draper, 'Regional Arrangements and Enforcement Action', *Revue égyptienne de droit international*, 20 (1964), pp. 1, 24.

it is generally agreed that no State is under a duty to provide troops for the Security Council unless it has agreed to do so, either under Article 43 or under *ad hoc* agreements of the type used to constitute O.N.U.C.—and yet military sanctions by the Security Council are surely enforcement action *par excellence*.

What is most significant of all is that Meeker's argument had never been invoked before, and has never been invoked since. Under Articles 6 and 7 of the Pact of the League of Arab States, military action is voluntary, but in 1948 the United States argued that the Arab States' military operations in Palestine could not be legal as enforcement action because they had not been authorized by the Security Council.[1] Even in the two previous disputes concerning the applicability of Article 53 of the United Nations Charter to the O.A.S., the United States and its allies never drew any distinction between decisions and recommendations; indeed, many of the arguments used by the United States and its allies during the two previous disputes are incompatible with Meeker's thesis.[2] What is more, when the O.A.S. set up the Inter-American Peacekeeping Force in the Dominican Republic in 1965, the United States and its allies did not try to justify the action taken by the O.A.S. on the basis of the arguments used during the Cuban missiles crisis, even though those arguments, if valid, would have covered the facts of the Inter-American Peacekeeping Force perfectly.[3]

It may be that the State Department lawyers themselves were aware of the weaknesses in their arguments, because they relied less on a restrictive interpretation of enforcement action than on an extensive interpretation of the concept of authorization by the Security Council.[4]

PART IV

Enforcement Action and Peace-keeping Action—The Civil War in the Dominican Republic, 1965[5]

The intervention by the United States

After the overthrow of the Trujillo regime, free elections were held in the Dominican Republic, and Juan Bosch, an intellectual of moderately

[1] *S.C.O.R.*, 3rd year, 307th meeting, 28 May 1948, p. 22. [2] See above, pp. 195–7.

[3] See below, pp. 210–13. Malaysia was the only State which attempted to resurrect Meeker's distinction between decisions and recommendations; see above, p. 194, n. 5.

[4] See below, pp. 216–19.

[5] For further information, see R. T. Bohan, 'The Dominican Case: Unilateral Intervention', *American Journal of International Law*, 60 (1966), p. 809; C. G. Fenwick, 'The Dominican Republic: Intervention or Collective Self-Defense', ibid., p. 64; R.-J. Dupuy, 'Les Etats-Unis, l'O.E.A. et l'O.N.U. à Saint-Domingue', *Annuaire français de droit international*, 11 (1965), p. 71; P. Geyelin, *Lyndon B. Johnson and the World* (1966), Chapter 10; A. Hennessy, 'Background to the Dominican coup', *The World Today*, 21 (1965), p. 236; D. Kurzman, *Santo Domingo: The Revolt of the Damned* (1965); L.-F. Manigat, 'La crise dominicaine', *Revue française de*

left-wing tendencies, was elected President in December 1962. In June 1963 Bosch was ousted by a military coup, and the United States withdrew economic aid for some months. Donald Reid, the civilian head of the government installed by the military, alienated both the working classes and the military by his policy of economic retrenchment, and on 24–5 April 1965 his government collapsed in the face of coups simultaneously launched by right-wing military leaders and left-wing supporters of ex-President Bosch,[1] who then proceeded to fight each other.

On 28 April President Johnson, who had frequently appealed for a cease-fire in the Dominican Republic, announced that he was sending United States marines to the Dominican Republic in order to evacuate United States citizens whose lives were endangered by the fighting.[2] It is extremely doubtful whether a State is nowadays entitled to use force in order to protect its nationals;[3] moreover, as far as the United States and the Dominican Republic were concerned, it would seem to be prohibited by the provisions against intervention in the O.A.S. Charter.

However, within a matter of days the United States Government was shifting its position and attempting to justify its intervention by the necessity of saving the Dominican Republic from the Communists, who had allegedly replaced the democratic elements as leaders of the left-wing forces. In all probability the United States exaggerated the dangers of Communism in the Dominican Republic, but by 31 April the United States forces in the Dominican Republic had grown to a size far larger than that needed for the evacuation of United States citizens and other foreigners, and were openly intervening on the side of the right-wing forces. Indeed, there is evidence that anti-Communism had been the real motive for the United States intervention from the beginning.[4]

science politique (1965), p. 1170; J. B. Martin, *Overtaken by Events* (1966); T. Szulc, *Dominican Diary* (1965); 'Chronique des faits internationaux', *Revue générale de droit international public*, 36 (1965), p. 1117.

[1] It is better to speak of right-wing and left-wing factions, instead of using tendentious terms like 'loyalists' and 'constitutionalists', or referring to the factions by the names of their leaders, who were constantly changing. 'Left-wing' does not necessarily mean 'Communist'.

[2] The text of President Johnson's statement may be found in *S.C.O.R.*, 20th year, Supplement for April, May and June 1965, p. 65 (S/6310 of 29 April 1965).

[3] D. W. Bowett, *Self-Defence in International Law* (1958), pp. 87–105; Ian Brownlie, *International Law and the Use of Force by States* (1963), pp. 289–301; Dupuy, loc. cit. (above, p. 203, n. 5), p. 77; Gerard, 'L'opération Stanleyville-Paulis devant le Parlement belge et les Nations Unies', *Revue belge de droit international* (1967), p. 242; Q. Wright, 'United States Intervention in the Lebanon', *American Journal of International Law*, 53 (1959), p. 112.

[4] P. Geyelin, *Lyndon B. Johnson and the World* (1966), pp. 43, 244–5, 255. On the reality of the Communist danger in the Dominican Republic, see also the differing conclusions reached by Tad Szulc, *Dominican Diary* (1965) and John Bartlow Martin, *Overtaken by Events* (1966). In fact, the right-wing forces had requested military assistance from the United States, but President Johnson did not quote this as a justification for his intervention; the right-wing 'government' was neither effective nor recognized, and President Johnson preferred to stress the *absence* of law and order, and the resulting danger for United States citizens, as a justification for intervention (Geyelin, op. cit., pp. 250, 252).

Over the years the O.A.S. has passed many anti-Communist resolutions, but none of these resolutions permits military action to prevent the installation of a Communist government in a member State, except when two conditions are both satisfied: (i) the action must be taken under the authority of the O.A.S., and (ii) the Communist forces must represent external subversion, and not an indigenous movement.[1] But, in the present case, the United States was not acting under the authority of the O.A.S., and it never proved or even alleged that the Communist movement in the Dominican Republic (assuming it existed) was the product of external subversion; the United States merely said that the Communists in the Dominican Republic had been trained abroad, but it is significant that it never denied that the 'Communists' were citizens of the Dominican Republic, normally resident there, and free from external control.

Even if one regards Communist regimes as a violation of the human rights provisions of the O.A.S. Charter, the reasons given for the United States intervention are still insufficient to justify it. The Bogotá Conference of 1948, which drew up the O.A.S. Charter, deliberately rejected the idea that the O.A.S. should be able to impose sanctions on States which violated human rights;[2] violation of human rights does not justify O.A.S. intervention unless it threatens *international* peace.[3] *A fortiori*, it does not justify unilateral intervention by another member State, and the practice of the O.A.S. has been entirely consistent on this point.[4]

Subsequently, the United States suggested another reason for its intervention:

> We continued our military presence in the Dominican Republic for the additional purpose of preserving the capacity of the O.A.S. to function in the manner indicated by the O.A.S. Charter . . . The action of the United States gave . . . the O.A.S. the essential time in which to consider the situation in the Dominican Republic and to determine means of preserving the rights of that country under the American system.[5]

[1] J. C. Dreier, *The O.A.S. and the Hemisphere Crisis* (1962), pp. 50–5; G. Connell-Smith, *The Inter-American System* (1966), pp. 230 et seq., 248 et seq.; J. P. S. McLaren, 'The Dominican Crisis: An Inter-American Dilemma', *Canadian Yearbook of International Law*, 4 (1966), pp. 178, 182; Irizarry y Puente, 'The Doctrines of Recognition and Intervention in Latin America', *Tulane Law Review*, 28 (1954), pp. 313, 341. And see the Uruguayan statement in *S.C.O.R.*, 20th year, 1198th meeting, 4 May 1965, paragraph 16.

[2] Ann van Wynen Thomas and A. J. Thomas (junior), *The Organization of American States* (1963), p. 223.

[3] C. G. Fenwick, loc. cit. (above, p. 203, n. 5), p. 66.

[4] Thomas and Thomas, *The Organization of American States* (1963), pp. 228–9; J. Slater, 'The United States, the O.A.S. and the Dominican Republic', *International Organization*, 18 (1964), pp. 268, 269. D. S. Bogen, 'The Law of Humanitarian Intervention', *Harvard International Law Club Journal*, 7 (1965–6), p. 296, suggests that the United States action could be justified under the principle of humanitarian intervention, but it is doubtful whether that principle has survived the entry into force of the United Nations Charter (as interpreted by the International Court of Justice in the *Corfu Channel* case, *I.C.J. Reports*, 1949, pp. 5, 35) and of the O.A.S. Charter.

[5] L. C. Meeker, *The Dominican Situation—a Problem of Hemispheric Security and International Law* (speech delivered to the American Foreign Law Association at the Harvard Club, New York,

But this seems to be an *ex post facto* rationalization, after the United States had realized that its original fears about Communists were exaggerated, and had been compelled by criticism in the Security Council and the O.A.S. to take a more conciliatory attitude. President Johnson had a low opinion of the O.A.S., and it is unlikely that he had originally intended to turn the problem over to the O.A.S.[1] Besides, it is difficult for the United States to shelter behind the O.A.S. Charter, since it is probable that the majority of the O.A.S. member States, if they had been asked in advance, would not have approved of the United States action. For the reasons stated in the preceding paragraphs, neither the United States nor the O.A.S. was entitled to intervene in order to protect United States citizens, to prevent the Communists from seizing power or to safeguard human rights. The action subsequently taken by the O.A.S. was justified by the consent of the two warring factions in the Dominican Republic;[2] but such a justification cannot be used as regards the original intervention by the United States, which was opposed by the left-wing faction.

The action taken by the O.A.S.

The United States informed the O.A.S. at once of the dispatch of the Marines to the Dominican Republic. On 29 April 1965, the O.A.S. Council appealed for a cease-fire in the Dominican Republic.[3] On the following day it passed a draft resolution tabled by the United States, repeating its appeal for a cease-fire, and also urging all forces, parties and factions 'to permit the establishment of an international neutral refuge zone comprising the section of the city of Santo Domingo immediately adjoining the embassies of foreign governments, the inviolability of the said zone to be respected by all the hostile factions, and the nationals of all countries to be guaranteed suitable protection and safety within the zone'.[4]

On 1 May the Tenth Meeting of Consultation of Ministers of Foreign Affairs, summoned by the O.A.S. Council,[5] set up a Committee of representatives from Argentina, Brazil, Colombia, Guatemala and Panama to go to the Dominican Republic in order to investigate the situation there and to use its good offices to secure a cease-fire and 'the orderly evacuation

on 9 June 1965). See also the United States statements in *S.C.O.R.*, 20th year, 1200th meeting, 5 May 1965, paragraphs 16, 27 et seq. and 1212th meeting, 19 May 1965, paragraph 149.

[1] Geyelin, op. cit. (above, p. 204, n. 4), p. 254.

[2] See below, p. 208.

[3] *S.C.O.R.*, 20th year, Supplement for April, May and June 1965 (S/6313 of 29 April 1965).

[4] Ibid., pp. 69–70 (S/6315 of 30 April 1965).

[5] The O.A.S. Council is empowered to summon meetings of Consultation to deal with threats to the peace, etc., but may act provisionally as a Meeting of Consultation itself until the proper Meeting assembles. In both organs each member State has one vote, and most questions must be decided by a two-thirds majority.

of the persons who have taken asylum in the embassies and of all foreign citizens who desire to leave the Dominican Republic'.[1]

Meanwhile the United States troops had established an 'international neutral refuge zone' in Santo Domingo by force, and on 30 April the Papal Nuncio had persuaded leaders of the two rival factions in the Dominican Republic to agree to a cease-fire. But this cease-fire, like others in the Dominican Republic at that time, turned out to be precarious in practice.

On 2 May the O.A.S. Committee of Five arrived in Santo Domingo and began to mediate between the two factions; on 5 May it persuaded them to sign the Act of Santo Domingo, which, after reaffirming the cease-fire of 30 April, provided as follows:[2]

2. The parties accept the establishment of a safety zone in the city of Santo Domingo, demarcated within the boundaries indicated on the map attached. . .

3. The parties bind themselves especially to respect this safety zone, within which there is guaranteed, in the manner that the O.A.S. may deem appropriate, adequate protection and safety for all persons found within that zone of refuge. . . .

On 6 May the Meeting of Consultation decided to create an Inter-American Force for the Dominican Republic. This resolution is too long to quote in full, but the most important provisions are the first two paragraphs, in which the Meeting resolved:

1. To request Governments of member States that are willing and capable of doing so to make contingents of their . . . forces available to the O.A.S., . . . to form an Inter-American Force that will operate under the authority of this Tenth Meeting of Consultation;

2. That this Force will have as its sole purpose, in a spirit of democratic *impartiality*, that of *co-operating* in the restoration of normal conditions in the Dominican Republic, in maintaining the security of its inhabitants and the inviolability of human rights, and in the establishment of an atmosphere of peace and conciliation that will permit the functioning of democratic institutions.

The preamble also states *inter alia*:

The formation of an Inter-American Force will signify *ipso facto* the transformation of forces presently in Dominican territory into another force that will not be that of one State or of a group of States but that of the O.A.S. . . .

. . .

The O.A.S. being competent to *assist* the member States in the preservation of peace and the re-establishment of normal democratic conditions, it is also competent to provide the means that circumstances and reality require. . . .[3]

[1] *S.C.O.R.*, 20th year, Supplement for April, May and June 1965, p. 131 (S/6319 of 1 May 1965).

[2] Ibid., pp. 140–1 (S/6364 of 12 May 1965).

[3] *S.C.O.R.*, 20th year, 1202nd meeting, 6 May 1965, paragraph 36. Italics added. Article 17 of the Rio Treaty requires decisions to be passed by a two-thirds majority of the States which have ratified the Treaty. Since 21 States (or 20, excluding Cuba, whose government had been suspended from participation in the O.A.S.) had ratified the Treaty, a two-thirds majority meant

The whole emphasis is on *assistance* and *co-operation* offered to the authorities in the Dominican Republic; so, although paragraph 5 of the resolution states that 'the withdrawal of the Inter-American Force from the Dominican Republic shall be determined by this Meeting', the underlying principle of the Force seems to be the consent of the various factions in the Dominican Republic. Indeed, this consent had already been given in advance; to begin with, at least, the Force operated entirely within the international neutral refuge zone, and the factions had agreed by the Act of Santo Domingo (which, incidentally, contained no expiry date) 'to respect this safety zone, within which is guaranteed, *in the manner that the O.A.S. may deem appropriate*, adequate protection and safety for all persons found within that zone of refuge'.[1] Moreover, the contribution of contingents by other member States was voluntary. All in all, the Force bears a close resemblance to the United Nations peace-keeping forces in the Middle East, Congo and above all Cyprus, where the United Nations force was created for the express purpose of maintaining peace during a civil war; and, just as the earlier United Nations peace-keeping forces were held by the International Court of Justice not to be enforcement action under Chapter VII of the Charter,[2] so it is probably impossible to relate the Inter-American Force to the Rio Treaty, which is the equivalent in the inter-American system of Chapter VII in the United Nations Charter.[3] But there is no reason why regional agencies should not possess the same *implied powers* as the United Nations to take peace-keeping action with the consent of the States concerned.

The objectives of the Force—impartial co-operation in the restoration of peace and democracy—are rather different from the reasons given by the United States for its original intervention. Like the previous O.A.S. resolutions, this resolution does not approve the action taken by the United States, and says nothing about the dangers of Communism and little about evacuating foreigners (the evacuation was by that time virtually complete in any case). Above all, the resolution's emphasis on impartiality is totally inconsistent with the United States' previous policy of intervening *against* the allegedly Communist leadership of the left-wing faction. The explana-

14 votes. Although Ecuador, Chile, Mexico, Peru and Uruguay opposed and Venezuela abstained, the resolution received 14 votes in favour. But one of the votes in favour was cast by the representative of the Dominican Republic, and it is arguable that his vote was void, since there was no effective government in the Dominican Republic capable of instructing him how to vote. However, it is normal practice in international organizations, after the overthrow of the government in a member State, for the representatives previously appointed by that government to be allowed to continue to represent the State until the organization votes to unseat them.

[1] See above, p. 207.

[2] *Certain Expenses of the United Nations, I.C.J. Reports*, 1962, pp. 151, 170, 177.

[3] Fenwick, loc. cit. (above, p. 203, n. 5), p. 66. The Latin American States which opposed the formation of the Force said that it was *ultra vires* the relevant O.A.S. treaties, and that it was in particular contrary to the non-intervention principle enshrined in those treaties.

tion is that the United States was becoming sensitive to criticism of its action from Latin America; opinion in the United States Government was divided over policy in the Dominican Republic, but many officials were coming to believe that the original estimate of the Communist danger there had been exaggerated.

Honduras, Costa Rica, Nicaragua and Brazil sent contingents to the Inter-American Force, but they were far outnumbered by the United States troops. On 22 May the Meeting of Consultation requested Brazil to appoint the Commander of the Force,[1] but the formation of the Force was not complete until 23 May 1965, when the Commanders of the national contingents (including the United States) and the Secretary-General of the O.A.S. signed an agreement placing all their forces under the exclusive authority of the Brazilian General Alvim.[2]

Meanwhile, on 10 May 1965, the Meeting of Consultation increased the powers of the Committee of Five, authorizing it to mediate with a view to establishing a broadly based democratic government.[3] Later the Committee of Five was replaced by a Committee of Three, with the same functions; the new Committee was headed by the United States diplomat Ellsworth Bunker, and the other representatives came from Brazil and El Salvador.[4]

The action taken by the Security Council

On 29 April the United States informed the Security Council that it was sending troops to the Dominican Republic.[5] The O.A.S. also kept the Security Council fully informed of its own activities, under Article 54 of the United Nations Charter.

On 1 May 1965 the Soviet Union requested an urgent meeting of the Security Council to discuss the United States interference in the Dominican Republic's internal affairs.[6] The Security Council discussed the situation in the Dominican Republic from 3 to 25 May, from 3 to 21 June, and from 21 to 26 July 1965, and most of its members were critical of the United States action.

On 14 May 1965 the Security Council unanimously passed a resolution calling for a cease-fire and inviting the Secretary-General 'to send . . . a representative to the Dominican Republic for the purpose of reporting to the Security Council on the present situation'.[7] On 22 May the Security

[1] *S.C.O.R.*, 20th year, Supplement for April, May and June 1965, p. 174 (S/6377/Rev. 1 of 22 May 1965).

[2] Ibid., pp. 177–9 (S/6381 of 24 May 1965). [3] Ibid. (S/6345/Rev. 1 of 10 May 1965).

[4] Ibid. (S/6372/Rev. 1 of 20 May 1965 and S/6401 of 2 June 1965).

[5] Ibid., p. 65 (S/6310). The message quotes President Johnson's statement of 28 April (see above, p. 204).

[6] Ibid., p. 70 (S/6316).

[7] Ibid., p. 160. The United Nations mission investigated the situation and mediated in order to secure a cease-fire, but, unlike the O.A.S. missions, it did not mediate in order to secure a

Council passed a resolution requesting that the suspension of hostilities in the Dominican Republic should be converted into a permanent cease-fire; ten States voted in favour of this resolution, but the United States abstained because the resolution did not acknowledge the work of the O.A.S.[1]

Finally the situation in the Dominican Republic gradually became more peaceful. As a result of mediation by the United States and the O.A.S., the rival factions signed an Act of Conciliation on 31 August 1965,[2] which led to the formation on 3 September of a Provisional Government under Señor Godoy, who was accepted by both sides. Elections were held on 1 June 1966; Señor Balaguer defeated ex-President Bosch and took office on 1 July 1966. On 24 June 1966 the O.A.S. voted *nem. con.* to withdraw its Force, and the withdrawal was completed on 21 September 1966.[3] The United Nations observers were withdrawn the following month.[4]

The Security Council debates on the legality of the Inter-American Force

The Security Council debates on the legality of the Inter-American Force were to some extent influenced by a belief that the actions of the O.A.S. were largely controlled by the United States. As we have seen, this is far from being true.[5] The O.A.S. policy was based on neutrality between the different factions in the Dominican Republic; like the United Nations in Cyprus, it appointed mediators and created a Force to supervise the cease-fire. But since the O.A.S. was seeking a settlement between factions whose relative power had already been altered by United States intervention,[6] it was naturally open to the charge that it was dominated by the United States. Similarly, President Johnson appointed his own mediators in the Dominican Republic, and the presence there of United States mediators and United Nations observers weakened the prestige of the O.A.S. and made it appear over-shadowed by the United States (and by the United Nations). Moreover, the Inter-American Force was commanded by a Brazilian general, but consisted mainly of the United States troops who had intervened unilaterally earlier; and the international neutral refuge zone, where the Inter-American Force operated, had been forcibly

long-term political settlement. Nevertheless, the O.A.S. Committee of Five bitterly attacked the United Nations mission as a violation of the principle of regional autonomy which the United States had hitherto supported, but which it had been forced to abandon as a result of severe criticism in the Security Council (ibid., pp. 160–1, and see above, p. 181 of the present study).

[1] *S.C.O.R.*, 20th year, 1217th meeting, 22 May 1965, paragraphs 35 and 46.

[2] Text in *International Legal Materials* (1965), p. 1150.

[3] 'Chronique des faits internationaux', *Revue générale de droit international public*, 37 (1966), p. 1028.

[4] *S.C.O.R.*, 21st year, Supplement for October, November and December 1966 (S/7551–2).

[5] See above, p. 208.

[6] P. Geyelin, *Lyndon B. Johnson and the World* (1966), p. 256, quotes the opinion of one State Department official that the right-wing faction would have collapsed in 24 hours at the end of April 1965 if the United States had not intervened.

established by United States troops before the Inter-American Force was created.[1] Nevertheless, if we are to draw any conclusions from this case about the powers of regional agencies in general, it is essential to separate the O.A.S. action from the United States intervention.

Appointment by the O.A.S. of mediators and fact-finding missions is so clearly within its powers under Article 52 of the United Nations Charter that it gave rise to little comment in the Security Council, except in so far as the O.A.S. resolutions were interpreted (wrongly) as approving or condoning the United States intervention. The real dispute arose over the Inter-American Force. The position taken by the Soviet Union was predictable. It condemned the creation of the Force as 'a smokescreen for . . . aggressive acts' by the United States, and as a violation of Article 15 of the O.A.S. Charter[2] and of Articles 2 (4), 39 and 53 of the United Nations Charter.[3] As regards Article 53, the Soviet Union said that the creation of any type of armed force, regardless of its purpose, by a regional agency constituted enforcement action and was invalid unless authorized by the Security Council. The Soviet Union's views on the incompatibility of the Inter-American Force with Article 53 of the United Nations Charter were shared not only by Cuba (participating in the debate by invitation), but also by Jordan.[4]

The United States, on the other hand, said that the Inter-American Force was created

> . . . solely for the purpose . . . of assisting in the restoration of normal conditions in the Dominican Republic and of making it possible for the Dominican people to determine their future and to operate under democratic institutions free from outside interference. Clearly, the Inter-American Force is not designed to act, and is not acting, against the Dominican Republic or the Dominican people. The Inter-American Force is not being employed to force any concession from a Dominican Government or to require a Dominican Government to follow or to abstain from any particular course of action. . . .

The United States therefore concluded that the Force did not constitute enforcement action under Article 53 of the United Nations Charter; rather, the Force was governed by Articles 52 and 54.[5] Malaysia agreed with this analysis.[6] Later the United States compared the Force with

[1] Thus, Uruguay considered the Inter-American Force unlawful because it was *ultra vires* the O.A.S. Charter, and also because of the principle *ex iniuria ius non oritur*—the original United States intervention having been unlawful (*S.C.O.R.*, 20th year, 1221st meeting, 7 June 1965, paragraphs 42–5).

[2] See above, p. 195, n. 4.

[3] *S.C.O.R.*, 20th year, Supplement for April, May and June 1965, pp. 225–7 (S/6411 of 3 June 1965).

[4] *S.C.O.R.*, 20th year, 1221st meeting, 7 June 1965, paragraph 22.

[5] Ibid., 1220th meeting, 3 June 1965, paragraphs 79–80.

[6] Ibid., 1222nd meeting, 9 June 1965, paragraphs 109–10.

United Nations peace-keeping forces in Cyprus, the Congo and the Middle East (in that order).[1]

Uruguay, however, argued that the Force could not be regarded as peace-keeping action, 'if only because a prerequisite generally regarded as essential is lacking, namely the consent of the interested party.'[2] France made the same point; the Dominican government had not consented to the presence of the Force, since there was no government, but only factions; and consent by factions could not bind the State.[3] With respect, this argument seems unduly formalistic; for does not consent given by both sides in a civil war represent the national will just as effectively as consent given by a government in more normal conditions? Even when both factions purported to revoke their consent,[4] it is arguable that this was insufficient to terminate the rights which the O.A.S. enjoyed as third-party beneficiary under the Act of Santo Domingo.[5]

Cease-fires were often made and often broken in the Dominican Republic. On more than one occasion in May, June and July 1965, the United States troops and the Inter-American Force tried to extend the international neutral refuge zone to cover territory of great tactical value held by the left-wing faction—and they were accused in the Security Council of showing bias in favour of the right-wing faction. The United States justified one of these incidents as follows:

> . . . the line of communications was advanced to protect the Inter-American Peace-keeping Force from continual, persistent and unrelenting attacks on it. . . . These are not moves to take over the Caamaño [left-wing] territory but only moves designed to protect the Inter-American Peace-keeping Force from assaults by the Caamaño forces.

He therefore denied that the Force had broken the cease-fire.[6] However, it is submitted that even if the Force had broken the cease-fire or committed other improper *acts*, this would not have made the Force illegal as an *institution*. Besides, a peace-keeping force in a civil war is always in a

[1] *S.C.O.R.*, 20th year, 1222nd meeting, 9th June 1965, paragraph 21. In 1962 the International Court of Justice had considered that U.N.E.F. and O.N.U.C., as peace-keeping forces, did not constitute enforcement action; see above, p. 208.

[2] *S.C.O.R.*, 20th year, 1221st meeting, 7 June 1965, paragraph 44.

[3] Ibid., paragraphs 60–1.

[4] Ibid., 1230th meeting, 20 July 1965, paragraphs 23 and 25.

[5] See above, p. 208. In fact, this argument was not used in the Security Council to counter the factions' demands for the Force's withdrawal. The United States representative pointed out that the factions' avowed motives for wanting the Force to go were so that they could slaughter each other, and said: 'The two factions, by the very frankness of their demands and of their intentions, have brought out even more starkly than before the vital importance of the . . . Force's remaining where it is in order to avoid the otherwise inevitable resumption of a bloody civil war' (*S.C.O.R.*, 20th year, 1230th meeting, 20 July 1965, paragraph 120).

[6] Ibid., 1226th meeting, 18 June 1965, paragraph 76. Cuba quoted the Brazilian commander of the Force as saying that the Force was not bound by the cease-fire (ibid., 1230th meeting, 20 July 1965, paragraph 39). No other reference to this alleged statement appears in the records of the Security Council, and the author has not been able to ascertain whether the quotation is genuine.

difficult position, and is open to accusations of showing bias and exceeding its powers, as the United Nations found in the Congo. Indeed, the United States compared the Inter-American Force's action against the left-wing snipers with O.N.U.C.'s fight to protect its freedom of movement in Katanga in December 1962.[1]

To sum up, then, we see the Soviet Union taking the same line as it did over United Nations peace-keeping forces, namely, that peace-keeping is indistinguishable from enforcement action, while the United States argues that the Inter-American Force, as a peace-keeping force, is not taking enforcement action and therefore does not need Security Council authorization under Article 53 of the United Nations Charter. But most other States had little of value to say about the capacity of regional agencies to set up peace-keeping forces, either because they confused the O.A.S. with the United States, or because they concentrated on isolated misdeeds by the Inter-American Force rather than on the legality of its creation, or because (like Uruguay and France) they considered that the factual pre-conditions for a peace-keeping force were not fulfilled in the present case.

There is, however, an additional argument which was not mentioned in the Security Council debates. A regional agency should be entitled to set up a peace-keeping force for the same reasons as it should be entitled to impose economic sanctions—because this is a step which any State may take individually. The United Kingdom sent a peace-keeping force to Cyprus before the United Nations did. It is true that the United Kingdom had a right of unilateral intervention in Cyprus under the Treaty of Zürich, 1960, but the United Kingdom preferred to rely on the consent of the Greek Cypriot and Turkish Cypriot communities rather than on the Treaty of Zürich (not least because the Greek Cypriots regarded the relevant provisions of the Treaty of Zürich as void). Similarly, a non-regional organization may take peace-keeping action. There has been talk recently of the Commonwealth (a non-regional organization *par excellence*) sending a peace-keeping force to police a possible cease-fire in the civil war which arose from Biafra's attempt to break away from Nigeria. Similarly, at the beginning of 1964 N.A.T.O. (an organization based on Article 51 of the United Nations Charter, not on Chapter VIII) was asked by the United Kingdom to help with the peace-keeping task in Cyprus; this proposal, however, was abandoned as a result of opposition by President Makarios.[2]

[1] Ibid., 1227th meeting, 18 June 1965, paragraph 73.

[2] Asbjørn Eide, 'Peace-keeping and Enforcement by Regional Organizations', *Journal of Peace Research*, 3 (1966), pp. 125, 127, 138–9. But, although N.A.T.O.'s main functions fall exclusively under Article 51, its peace-keeping activities might be regarded as subject to Chapter VIII; see above, p. 180. Or would this conclusion be altered by the fact that Cyprus was not a member of N.A.T.O. (although geographically close to the territory of certain members)? Cf. pp. 219–21, below.

PART V

Authorization by the Security Council

At what time should authorization be given?

A regional agency may plan enforcement action on its own initiative, provided it reports its plans to the Security Council under Article 54 of the United Nations Charter; authorization by the Security Council is not needed until it is a question of actually putting the previously agreed plans into effect. This permits contingency planning in advance.[1]

Can the authorization be postponed until after the enforcement action has started? In other words, can the authorization be retroactive? The Soviet Union seemed to think so in 1960, when it suggested that the Security Council should approve the sanctions which the O.A.S. had imposed, with immediate effect, upon the Dominican Republic sixteen days earlier.[2] But the French representative argued that 'to attempt to apply Article 53 to this case [as the Soviet Union sought to do] would be self-contradictory, since the provision invoked involves the authorization of the Security Council and it is clear that this authorization must be given in advance'.[3]

It is submitted that the French representative was correct on this point. To hold otherwise would be to encourage illegal acts, because regional agencies would be tempted to initiate enforcement action in the hope that the Security Council would give its authorization afterwards, but this hope might not always be fulfilled. In other cases the Security Council might feel that it would be politically awkward to withhold authorization for what had already been done; confronting the Security Council with *faits accomplis* would therefore fetter the discretion which Article 53 intended it to enjoy. Finally, it must be remembered that the Security Council's authorization is a decision taken to the detriment of the State against whom the enforcement action is directed, and it is a general principle of law that a legislative text (like the United Nations Charter) should, if possible, not be interpreted to permit retroactive decisions to be taken to the detriment of a party concerned.

The role of the General Assembly

Jiménez de Arechaga[4] suggests that the General Assembly could act in place of the Security Council under the Uniting for Peace Resolution[5]

[1] Jiménez de Arechaga, loc. cit. (above, p. 181, n. 1), p. 497. [2] See above, pp. 188–9.

[3] *S.C.O.R.*, 15th year, 893rd meeting, 8 September 1960, paragraph 90. As regards the analogous problem of a regional agency authorizing action by one of its members, it is significant that the United States waited for the O.A.S. resolution before proclaiming the quarantine around Cuba in October 1962; see above, p. 198.

[4] Loc. cit. (above, p. 181, n. 1), pp. 463–5.

[5] General Assembly Resolution 377 (V) of 3 November 1950.

and authorize regional agencies to take enforcement action within the meaning of Article 53 of the United Nations Charter. Paragraph C of the Uniting for Peace Resolution recommended member States to maintain within their national armed forces elements which could be made available 'for service as a United Nations unit or units, upon recommendation by the Security Council or the General Assembly'. But on the only occasion when paragraph C was put into effect (on 1 February 1951, when the General Assembly recommended[1] member States to resist the forces of Communist China which had come to help the North Koreans in the Korean War), the action taken by the members of the United Nations could more appropriately have been justified under Article 51 of the Charter;[2] in such circumstances the General Assembly resolution, voted for by a large number of disinterested states, is strong evidence (but no more) that the facts of the case are such as to justify the use of force in collective self-defence.[3] Similarly, U.N.E.F. fell far short of the type of force contemplated by paragraph C of the Uniting for Peace Resolution, since it operated exclusively with the consent of the States concerned; and its supporters were emphatic in stressing that it was not seeking to infringe the Security Council's monopoly by taking enforcement action.[4] So *in practice* the General Assembly has never claimed a power to take enforcement action; how therefore can it authorize regional agencies to take enforcement action? Even under the Uniting for Peace Resolution the General Assembly has never possessed more than a power to make recommendations, and a recommendation by a political organ of the United Nations cannot make a State subject to the jurisdiction of an international tribunal which would normally have lacked jurisdiction over that State;[5] by the same token, surely, such a recommendation cannot legalize that which would be otherwise illegal.[6]

When drawing up a text which empowered the Security Council to authorize enforcement action by regional agencies but which did not confer a similar power on other United Nations organs, the States assembled at San Francisco in 1945 clearly intended that this power should be the monopoly of the Security Council.[7] The most superficial glance at the *travaux préparatoires* indicates that *inclusio unius, exclusio alterius* corresponded exactly to the intentions of the parties. Consequently, even on Seyersted's liberal theory of implied powers, it is impossible to hold that

[1] Resolution 498 (V).

[2] Julius Stone, *Legal Controls of International Conflict* (revised ed., 1959), p. 234.

[3] F. Blaine Sloan, 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations', this *Year Book*, 25 (1948), pp. 1, 29–30.

[4] Cf. *Certain Expenses of the United Nations, I.C.J. Reports*, 1962, pp. 151, 170, 177.

[5] *Corfu Channel* case, *I.C.J. Reports*, 1947–8, pp. 15, 31–2 (separate opinion by Judge Basdevant and six others).

[6] See Fitzmaurice in this *Year Book*, 34 (1958), pp. 1, 5.

[7] See below, pp. 218–19.

the General Assembly can act as a substitute for the Security Council in this respect.[1] Nor can this conclusion be weakened by analogies drawn from the Uniting for Peace Resolution; that resolution probably did not attempt to amend the Charter, and certainly could not have succeeded if it had made such an attempt, for the Charter must obviously override a General Assembly resolution in the event of conflict.

Asbjørn Eide[2] points out that there is political wisdom in requiring Security Council authorization for military action, because military action taken by a regional agency against the wishes of a Great Power (and not justified by self-defence) is likely to lead to a world war. But different considerations apply, he says, in the case of non-military sanctions and peace-keeping action. 'Taking into account that such measures . . . will fall short of military action in intensity, and that they are less likely to create a serious world conflict even when they are taken against the resistance of one or more great powers, it seems very reasonable to hold that authorization of such measures can be given by the General Assembly.'[3]

This suggestion forms an attractive compromise between the opposing interpretations of Article 53 put forward by the Soviet Union and the United States. But it seems impossible to reconcile with the Charter. Either a particular activity constitutes enforcement action, in which case the Security Council must give its authorization, and authorization from any other body is worthless; or the activity does not constitute enforcement action, in which case the regional agency eludes control by *any* United Nations organ. However, the future may produce acceptance of Asbjørn Eide's idea as a constitutional convention, if not as an amendment to the Charter; such a development would subject regional agencies to a degree of centralized control which would be effective without being excessive, in addition to giving all the members of the United Nations an opportunity to express their views on the correct interpretation of Article 53 of the United Nations Charter (an opportunity which has hitherto been virtually confined to the more limited membership of the Security Council).

Authorization and acquiescence—the Cuban missiles crisis

The imposition of the quarantine around Cuba during the Cuban missiles crisis was done under an O.A.S. resolution, and the State Department lawyers took great pains over arguing that that resolution was not contrary to Article 53 of the United Nations Charter. To some extent they

[1] Finn Seyersted, 'United Nations Forces: Some Legal Problems', this *Year Book*, 37 (1961), pp. 351, 458–9.

[2] 'Peace-keeping and Enforcement by Regional Organizations', *Journal of Peace Research*, 3 (1966), p. 125.

[3] Ibid., pp. 141–2.

relied on a restrictive interpretation of 'enforcement action';[1] but they relied principally on an extensive interpretation of 'authorization', with mere acquiescence amounting to authorization. As Meeker[2] put it:

> The Council did not see fit to take any action in derogation of the quarantine. Although a [draft] resolution condemning the quarantine was laid before the Council by the Soviet Union, the Council subsequently, by general consent, refrained from acting upon it,[3] and instead chose to promote the course of a negotiated settlement. . . . Authorization may be said to have been granted by the course which the Council adopted.

In other words, authorization can, it is argued, be inferred from the Security Council's failure to pass a resolution condemning the enforcement action. Presumably this form of 'authorization' could exist not only when a question is not put to the vote, but also when it *is* put to the vote and is vetoed or fails to secure the proper majority.

Chayes[4] invokes the Security Council's consideration of the Dominican Republic in 1960 as a precedent for this view.

> The debates in the Security Council in the case of the Dominican Republic revealed a widespread readiness to conclude that the requirement of 'authorization' does not import prior approval, but would be satisfied by subsequent action of the Council, or even by a mere 'taking note' of the acts of the regional organization.

But the members and supporters of the O.A.S. at that time argued that economic sanctions were not enforcement action and therefore did not require authorization by the Security Council, so that the incident throws no light on the meaning of 'authorization.'

Secondly, the State Department lawyers draw an analogy with the custom which has grown up concerning abstentions by permanent members in the Security Council, which conflicts with the literal meaning of Article 27 (3) of the United Nations Charter.[5] But that custom is based on the *travaux préparatoires*,[6] on a continuous practice, and on acceptance by all the States concerned; it cannot be extended by analogy to wholly different situations where these three factors are lacking. Besides, there is a clear difference between acquiescence by a permanent member and acquiescence by the Security Council as a body; when a permanent member abstains from voting, it is presumably not unwilling to see the resolution passed, but failure by the Security Council to condemn a regional action might be

[1] See above, pp. 201–3. For the facts of the Cuban missiles crisis, see above, pp. 197–9.

[2] L. C. Meeker, 'Defensive Quarantine and the Law', *American Journal of International Law*, 57 (1963), p. 515.

[3] It also refrained from acting upon the United States draft resolution, but Meeker does not mention this.

[4] A. Chayes, 'Law and the Quarantine of Cuba', *Foreign Affairs*, 41 (1962–3), pp. 552, 556.

[5] Ibid., p. 556.

[6] McDougal and Gardner, 'The Veto and the Charter', *Yale Law Journal*, 60 (1951), pp. 258, 277–8.

caused by the veto of a permanent member, even though all the other members wished to condemn the action in question—to talk in these circumstances of acquiescence by the Security Council is rather artificial. Perhaps a closer analogy with Article 53 may be found in the *Second Admissions* case[1] where the International Court of Justice, interpreting Article 4 (2) of the United Nations Charter,[2] advised that the General Assembly was powerless to admit a State to the United Nations in the absence of an *express and positive* recommendation by the Security Council; by analogy, therefore, the authorization given by the Security Council under Article 53 must also be express and positive.

The State Department lawyers[3] also emphasize that the Security Council's responsibility for maintaining peace under Article 24 is primary, not exclusive, and they suggest that a shift of power from the Security Council (paralysed by the veto) to regional agencies would be comparable with the shift of power which has already occurred from the Security Council to the General Assembly and the Secretary-General. But, even if a shift of power from one United Nations organ to another can be compared with a development which would take power outside the United Nations altogether, the shift of power from the Security Council to the General Assembly and the Secretary-General has involved less strain on the literal meaning of the Charter, has lasted longer and has been more widely accepted than the proposed shift of power to regional agencies. In any case, the General Assembly and the Secretary-General have never claimed the power to take enforcement action,[4] so that this analogy provides no support for the degree of regional autonomy which the United States was seeking.

The States represented at San Francisco were perfectly well aware that authorization by the Security Council required an express, positive vote, and that the veto of a single permanent member could prevent the Security Council from giving its authorization; they foresaw, too, that the veto might be used in an excessive and unreasonable way. That was why the parties to certain regional arrangements went to such lengths (threatening to leave the conference at one stage) in their attempts to have this provision altered.[5] If 'authorization' had merely meant 'acquiescence', the bitter dispute would have been pointless, and so would the compromise settlement which enabled action to be taken in self-defence without Security Council authorization '. . . until the Security Council has taken measures

[1] *I.C.J. Reports*, 1950, p. 4.

[2] 'The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.'

[3] Chayes, loc. cit. (above, p. 217, n. 4), p. 556; Meeker, loc. cit. (above, p. 217, n. 2), pp. 519–20.

[4] See above, p. 215.

[5] R. Yakemtchouk, *L'O.N.U.: la sécurité régionale et le problème du régionalisme* (1955), pp. 100 et seq. See especially the Venezuelan statement in *U.N.C.I.O.*, vol. 4, pp. 265–6.

necessary to maintain international peace and security'.[1] The drafters of the Charter showed political wisdom in not giving regional agencies a general power to take military action without Security Council authorization, because otherwise it would have been too easy for States to evade the prohibitions on the use of force in Article 2 (4).

Moreover, the practice of the Security Council is incompatible with attempts to equate 'authorization' with 'acquiescence'. In 1948 the United States said that the League of Arab States could not take enforcement action without the authorization of the Security Council, and the United States seems to have regarded authorization then as requiring an express, positive vote.[2] Similarly, if the United States and its friends thought that 'authorization' meant 'acquiescence', why did they take such trouble in arguing that the O.A.S. sanctions against the Dominican Republic in 1960, and against Cuba at the beginning of 1962, were not enforcement action and did not therefore need Security Council authorization?[3] Finally, it is significant that the United States apparently abandoned its extensive definition of 'authorization' during the dispute over the Dominican Republic in 1965, when its representative on the Security Council said:

> Regional organizations should not, of course, take enforcement action without the authorization of the Security Council. But in the Dominican Republic case the O.A.S. did not take the kind of action that would require Security Council *approval*.[4]

PART VI

Regional Agencies and Non-members

Another issue which arose during the Cuban missiles crisis concerned the capacity of regional agencies to take enforcement action (or other types of action) against non-members. In so far as the quarantine was directed against Cuba, there was no problem, since Cuba was a member of the O.A.S.; its government had been suspended from participation, but suspension does not suspend the duties and liabilities attached to membership—it only suspends the rights attached to membership.[5] The difficulty arose over the application of the quarantine to ships flying the flags of non-members of the O.A.S.

Meeker said that Chapter VIII of the United Nations Charter had the effect of rendering the relevant O.A.S. resolution *opposable*, as the French would say, to all members of the United Nations, whether or not they

[1] Article 51 of the United Nations Charter. Note also the provisions about former enemy States in Article 53.

[2] See above, p. 203.

[3] See above, pp. 195–7.

[4] Italics added. *S.C.O.R.*, 20th year, 1217th meeting, 22 May 1965, paragraph 28.

[5] C. W. Jenks, 'Some Constitutional Problems of International Organizations', this *Year Book*, 22 (1945), pp. 11, 25.

were members of the O.A.S.[1] But this is begging the question; does Chapter VIII allow regional agencies to act against non-members? Other authorities assume equally baldly that it does *not*.[2]

The question was hardly considered at San Francisco, because it was not generally realized then that a regional agency could impose sanctions which did not constitute enforcement action. So long as all sanctions are regarded as enforcement action and subject to Security Council authorization, a regional agency's powers against non-members are of little importance; the Security Council can protect non-members of the regional agency against intimidation, by withholding its authorization from the agency. It is only recently, when restrictive interpretations of 'enforcement action' and expansive interpretations of 'authorization' have been suggested, that the issue has assumed importance. However, despite the San Francisco conference's failure to consider the problem directly, some indirect guidance may be drawn from the two exceptional cases where Security Council authorization is not needed: self-defence, and action against former enemy States.

Article 51 was inserted in the Charter at the insistence of the 'regionalists' (more particularly, the Latin Americans). A right of collective self-defence would be valueless to members of a regional agency if they could not exercise it against non-members. But the fact that members of a regional agency can act in collective self-defence against a non-member under Article 51 does not necessarily prove that they can act against a non-member under Chapter VIII. The Charter does not treat collective self-defence as a form of enforcement action, but as something *sui generis*; Articles 51 and 53 are in separate Chapters of the Charter; and the right of collective self-defence is enjoyed by all States and is not limited to regional arrangements or regional agencies.

Of more significance are the provisions in Article 53 about enforcement action against former enemy States. Regional arrangements had been made for that purpose long before the San Francisco conference, and it is inconceivable that the States represented at San Francisco intended to make the efficacy of those arrangements conditional upon the former enemy States participating in those arrangements. Nor is there any indication, either in the Charter or in the *travaux préparatoires*, that regional arrangements directed against former enemy States are to be treated differently from other regional arrangements, save as regards the necessity for authorization by the Security Council; the two types of arrangement are dealt with side by side in Article 53.

[1] L. C. Meeker, 'Defensive Quarantine and the Law', *American Journal of International Law*, 57 (1963), pp. 515, 517–18.

[2] Q. Wright, 'The Cuban Quarantine', ibid., pp. 546, 558–9; and see the Tunisian statement in *S.C.O.R.*, 15th year, 894th meeting, 9 September 1960, paragraph 37.

Finally, Article 53 states that 'the Security Council shall, where appropriate, utilize . . . regional arrangements or agencies for enforcement action under its authority'. Regional agencies would be little use to the Security Council in these circumstances if they could not take enforcement action against States which were not members of them; and, if a regional agency can act against a non-member when it is acting under the Security Council's authority, why can it not do the same when it is acting on its own initiative but with the authorization of the Security Council? Article 2 (6) enables the United Nations to act against non-members of the United Nations, so there is a certain logic in allowing regional agencies to act against States which are not among their own members.

A related problem which also calls for brief discussion is whether a regional agency can act against a State which is not only not a member of the agency, but also outside the 'region' in question. Article 52 (1) provides that 'nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters . . . as are appropriate for regional action', but it does not necessarily follow that the Charter intended that matters which were not appropriate for regional action should automatically be *ultra vires* a regional agency.[1] In any case, if a non-regional State disturbs the peace within the region, this is unquestionably a matter which is 'appropriate for regional action'. If, on the other hand, the non-regional State does not disturb the peace within the region, the members of the regional agency are unlikely to contemplate taking any active steps against him, so the problem is not a very real one.

PART VII

Regional Agencies and the Relation Between International Law and International Politics

The layman thinks of law in terms of black and white. Indeed, the whole judicial process makes issues of legality and illegality appear in terms of black and white; the damages and costs awarded to a successful plaintiff

[1] Yakemtchouk, *L'O.N.U.: la sécurité régionale et le problème du régionalisme* (1955), pp. 158–9. The writer who places the most extreme *a contrario* interpretation on Article 52 (1) is Julius Stone, *Legal Controls of International Conflict* (revised impression, 1959), pp. 247–9. He argues that to permit a regional agency to take enforcement action against a State outside the region would enable the Security Council to use one regional agency to take enforcement action 'under its authority' against another regional agency, which he considers would be contrary to the purposes and principles of the United Nations; but, if a regional agency is the strongest body available for imposing the Security Council's will on another regional agency, surely the purposes and principles of the United Nations are all in favour of the Security Council's using the first regional agency—*ut res magis valeat quam pereat.*

Stone also argues that absurd results would be produced if regional agencies could take enforcement action against non-regional powers; for instance, they would have to disclose their plans in advance to the Security Council under Article 54, which would be tantamount to

do not vary according to whether his case was watertight or moot. But practising lawyers know that the law often has to be stated in terms of probabilities, not certainties. In international law, where adjudication is rare, the distinction between legality and illegality is even more blurred; in diplomatic negotiations and United Nations debates it is often sufficient simply to convince the other side and third parties that one's claim is *reasonable*, without necessarily being absolutely correct. There is not a conspicuous line between legality and illegality, but a spectrum of varying degrees of legal soundness and unsoundness.

It is an exaggeration to say that States disregard international law when their vital interests are at stake. But what can happen in such circumstances is that national leaders and legal advisers lose something of their objectivity, and are satisfied with a lesser degree of legal soundness than they would normally require before adopting a policy.[1] Thus it is quite possible that the legal justifications given by the United States for its actions during the Cuban missiles crisis seemed sound at the time to its leaders and legal advisers, even though the justifications seem more doubtful when subjected to a later and more detached examination.[2]

It is particularly significant that the United States justified its action, not by virtue of Article 51 of the Charter, as many academic writers suggested,[3] but by virtue of the powers derived by the O.A.S. from Chapter

disclosure to the intended victim. But is disclosure to a non-regional victim any more absurd than disclosure to an intended victim *inside* the region?

The central fallacy in Stone's thinking is his assumption that the Charter must be interpreted so as to produce the most centralized power-structure possible. In fact, however, Chapter VIII represents a compromise between centralization and regionalism.

[1] This is dangerous, because a claim which seems plausible to the claimant may not seem so to the other side (especially if the other side is equally inflamed).

[2] See above, pp. 201–3 and 217–19.

[3] See above, p. 201. It is perhaps worth examining another interesting justification suggested by Jiménez de Arechaga, loc. cit. (above, p. 181, n. 1), p. 508: '. . . ces mesures sont justifiées, au point-de-vue juridique, du fait qu'elles constituent un moyen nécessaire, adéquat, et surtout accepté, par l'autre partie intéressée, de préserver le 'statu quo' ou la stabilité nucléaire.' But the Soviet withdrawal of the missiles took place under duress, so there was no true consent. Even if there had been, it is doubtful whether one can infer an *opinio juris* so as to give rise to a new rule of customary international law, as Jiménez de Arechaga suggests.

Besides, in 1962 the United States had far more inter-continental missiles than the Soviet Union, so that the installation of Soviet intermediate range missiles in Cuba did not upset the nuclear balance of power, but restored it. It is true that the missiles in Cuba were not covered by the United States early warning system, but there was no danger of the Soviet Union being tempted to make a pre-emptive strike against the United States, which already possessed a considerable second strike capacity. See R. J. Barnet, 'The Cuban Crisis and Disarmament', *Proceedings of the American Society of International Law* (1963), pp. 1, 2; B. Beedham, 'Cuba Missile Balance of Power', *The World Today*, 19 (1963), pp. 36–41; A. L. Horelick, 'The Cuban and the Crisis: An Analysis of Soviet Calculations and Behavior', *World Politics*, 16 (1963–4), pp. 363, 374–5; L. Henkin, loc. cit. (above, p. 199, n. 3), pp. 254–5. To this day the United States has deliberately retained a great nuclear superiority over the Soviet Union: 'McNamara's Testament', *The Economist* (10 February 1968), pp. 37–8.

Similarly, the secrecy with which the missiles were installed is not necessarily proof of aggressive motives or of an intent to *bouleverser* the nuclear balance of power; it could have been caused

VIII of the Charter. This neglect of Article 51 in favour of Chapter VIII has been a consistent feature of United States policy; thus, France suggested that the O.A.S. sanctions against Cuba at the beginning of 1962 could be justified by Article 51,[1] but the United States studiously avoided this argument. Even in 1965, when it intervened unilaterally in the Dominican Republic, the United States subsequently half-yielded the stage to the O.A.S. and tried to claim that it had been acting all along as a sort of *negotiorum gestor* for the O.A.S.

The United States avoided invoking Article 51 because it realized that it might have created a dangerous precedent.[2] International law is based largely on custom, and, whenever a State takes an action of dubious legality, it weakens the pre-existing rule and creates a precedent which may be used against its interests by other States at a later date. This is a factor which makes States respect international law, which has no counterpart in municipal law, and which compensates for the much-emphasized weakness of sanctions in international law. If the United States had based its actions on Article 51, the Soviet Union could have made similar claims to prevent the transport of United States missiles to members of N.A.T.O. near the Soviet Union, for, as Professor Georg Schwarzenberger put it:

> . . . it is as impossible to distinguish between offensive and defensive nuclear missiles and aircraft as between offensive and defensive walking-sticks. The offensive or defensive character never lies in the weapon, but in its use. To maintain that while, by definition, weapons under exclusive United States control in countries neighbouring on the Soviet Union or aboard United States fleets and Polaris submarines are defensive, Russian-controlled weapons in the Caribbean are offensive is a remarkable feat of special pleading.[3]

Moreover, every State in the world could have claimed that it was menaced by a build-up of weapons by one of its neighbours, and could have resorted to preventive war. The result would have been to annihilate the prohibition on the use or threat of force in Article 2 (4) of the United Nations Charter.

by a fear—well-founded, as it turned out—that the United States, if it knew of the missiles, would try to prevent their installation before they became operational. On this analysis the Soviet secrecy would be fully compatible with the idea that the missiles were intended solely for deterrence.

H. M. Pachter, *Collision Course: the Cuban Missile Crisis and Coexistence* (1963), pp. 11, 21 et seq., suggests that the whole crisis was a contest in determination; if President Kennedy had shown himself weak over Cuba, the Soviet Union would have assumed that he would show himself weak over Berlin; indeed it is possible that the Soviet Union intended to 'trade' Cuba for Berlin. Hence President Kennedy was the prisoner of his earlier warnings about not tolerating offensive weapons in Cuba.

[1] *S.C.O.R.*, 17th year, 995th meeting, 20 March 1962, p. 13.

[2] Elie Abel, *The Missiles Crisis* (1966), p. 115. Reliance on the powers derived by the O.A.S. from Chapter VIII also had the political advantage of associating the Latin American States with the action taken by the United States; instead of the United States appearing to bully Cuba, the picture was produced of the whole Western hemisphere joining together against a common danger.

[3] 'The Misery and Grandeur of International Law' (inaugural lecture, 1964), p. 8.

The same result would have been produced if the United States had tried to justify its action by restrictive interpretations of Article 2 (4), as suggested by some commentators.[1]

Reliance on the powers of the O.A.S. created a risk that other regional agencies would use this as a precedent for action against unpopular States in their own regions. Indeed, the Soviet Union invoked that risk as an argument against allowing regional agencies too much autonomy.[2] The United States was prepared to accept the risk, calculating perhaps that other regional agencies were not as developed as the O.A.S. and that there was no general regional agency at all among the Soviet Union's allies in Eastern Europe (the Warsaw Pact and Comecon are too specialized to act effectively as regional agencies within the meaning of Chapter VIII). However, the United States did praise regionalism in general terms, no doubt hoping to win support from States which were members of other regional agencies, such as the League of Arab States and the Organization of African Unity.

In the context of Article 53 of the United Nations Charter, the alternative to regional autonomy was Security Council control, and the support given by the United States to the cause of regional autonomy fits in well with its other attempts to minimize the effects of the veto in the Security Council, e.g. by building up the General Assembly and the Secretary-General at the expense of the Security Council. Indeed, the United States and its friends emphasized the evils of the veto as an argument in favour of regional autonomy.[3]

The logical consequence of United States policy towards the O.A.S. is that *all* regional agencies will become increasingly powerful—perhaps more powerful than the United Nations Charter intended. The importance of regional agencies will then lie not in their legal powers (for, as we have seen,[4] the arguments used to justify the autonomy of regional agencies could also be used to justify the autonomy of all other organizations as well), but in their political position. In order to understand that position, it is necessary to emphasize that law is not the only normative order in the international community, or indeed in any community. Every society, in addition to having a system of law, has systems of morality, etiquette, grammar, etc. There may also be informal patterns of segregation, whereby

[1] See above, pp. 200.

[2] *S.C.O.R.*, 17th year, 991st meeting, 27 February 1962, p. 10.

[3] Ibid., 993rd meeting, 15 March 1962, pp. 14–15; ibid., 994th meeting, 16 March 1962, pp. 6, 10; ibid., 995th meeting, 20 March 1962, pp. 6–7; ibid., 998th meeting, 23 March 1962, pp. 14–15, 29. Venezuela gave a legal turn to the argument by saying that any provision which conferred a special privilege on particular States (and the Charter did give a special privilege to the permanent members of the Security Council) should be interpreted restrictively: ibid., 997th meeting, 22 March 1962, pp. 6–7.

[4] See above, pp. 181–3.

members of one social, racial or religious group live in one part of a town, for instance, and other groups in other parts. The nearest equivalent to these patterns in international society takes the form of spheres of influence.

The traditional sphere of influence was hegemonic; the territory of small powers lay within the sphere of influence of a great power. Apart from a brief flirtation at the end of the nineteenth century, international law has made no effort to embrace the concept of spheres of influence. Sometimes the concept of spheres of influence complements international law, for instance, when it prevents one great power from intervening in the affairs of a small power which is within the sphere of influence of another great power. At other times the concept conflicts with international law, as when it authorizes great powers to intervene in the affairs of those smaller powers who lie within their spheres of influence.[1] There is always a danger that the law will be brought into contempt if it conflicts with other norms accepted by the community; this is particularly true where the law is weak, as it is in the international community. There is therefore much to be said for a compromise between spheres of influence and international law, whereby each undergoes changes to bring it into harmony with the other.

The recent practice of the Security Council, in favour of autonomy for regional agencies, provides the type of compromise which is needed. Regional agencies are a variant on traditional spheres of influence, no longer organized on a hegemonic basis, but on a multilateral basis. Thus the Monroe doctrine, with its extravagant corollaries of United States hegemony over Latin America, is replaced by the Organization of American States,[2] in which every State has one vote and decisions are taken by a two-thirds majority.

[1] If anyone doubts that spheres of influence are relevant to modern politics, let him contrast the failure of the United States to prevent the Soviet Union crushing the 1956 rebellion in Hungary (regarded as being in the Eastern sphere of influence) with the assistance which it gave to the coup in 1954 against the Communist regime in Guatemala (regarded as being in the Western sphere of influence). The Soviet Union spoke openly of spheres of influence at the time of its invasion of Czechoslovakia in August 1968.

[2] Is the Monroe Doctrine dead? United States leaders have often condemned Communist subversion in Latin America as contrary to the Doctrine (D. M. Dozer, *The Monroe Doctrine: Its Modern Significance* (1965), pp. 168, 186–7), but they have never justified any United States or O.A.S. action against Communist threats by reference to the Doctrine—despite pressure from Congress and the mass media (ibid., pp. 188–96). Admittedly President Kennedy said in a news conference on 29 August 1962 that he was defending the Doctrine by seeking to 'isolate the Communist menace in Cuba'; but this related to the effect of his acts, not to their legal justification.

Expressions of faith in the Doctrine are favourably received by public opinion in the United States; but no United States President could afford to justify action by the United States or the O.A.S. on the basis of the Doctrine, because it is unpopular in Latin America as a result of its past associations with the idea of United States hegemony. Even the United States intervention in the Dominican Republic in 1965, which awakened fears that the United States was reviving the most excessive corollaries of the Monroe Doctrine, was never publicly justified by reference to the Doctrine. Instead, the United States paid lip-service to the O.A.S. (see above, pp. 205–6. The intervention aroused so much criticism in Latin America that the United States probably feels that a repetition of the episode would be counter-productive.

Of course it is easy to argue that the equality of member States in the O.A.S. exists largely on paper; that Latin America, which has a larger population than the United States, has a gross national product equivalent to 10 per cent of that of the United States; that many Latin American countries are economically dependent on the United States; and that some dictatorships look to the United States rather than to their own subjects for political support. Many people in the Eastern Hemisphere, and some cold warriors in the United States, regard the O.A.S. as an instrument of United States policy.

It is true that the United States has great influence in the O.A.S., but this should not be exaggerated. The fact that many Latin American countries pursue the same policies as the United States does not mean that they are United States puppets. During the early 1960s the O.A.S. was more active against the Trujillo regime in the Dominican Republic, and less active against the Castro regime in Cuba, than the United States would have liked.[1] More than once, the United States has had to 'water down' anti-Communist draft resolutions in order to be sure of getting a sufficient majority; even so, there have been dissenting votes and abstentions.[2] The fact that the United States intervened unilaterally in the Dominican Republic in 1965 is paradoxically evidence of the independence of the O.A.S.; the intervention *had* to be unilateral, because the United States knew that it would not have obtained authorization from the O.A.S. (Later, when the O.A.S. began dealing with the situation in the Dominican Republic, it pursued aims which were scarcely compatible with the reasons given by the United States for its original intervention.)[3] The Latin American support for regionalism at the San Francisco conference in 1945 (at a time when unilateral United States interventions were much fresher in their memories) shows that they did not regard the inter-American system as dominated by the United States; on the contrary, they considered that a strong inter-American system was the only way to persuade the United States to accept the principle of the equality of States. And the fact that they supported regionalism so vehemently at San Francisco demonstrates that they were not docilely following United States policy, because at that time the United States Government was divided on the merits of regionalism.

Spheres of influence of a multilateral character, like the O.A.S., are more stable than hegemonic spheres of influence, because the system is accepted by the States concerned, instead of being imposed by the stronger on the weaker. By the same token, they are closer to the principle of sovereign

[1] J. C. Dreier, *The O.A.S. and the Hemisphere Crisis* (1962), pp. 90–4.
[2] G. Connell-Smith, *The Inter-American System* (1966), pp. 230 et seq., 248 et seq.
[3] See above, p. 208.

equality of States, which is the foundation-stone of international law, although, in so far as a regional agency can act against a non-member,[1] there is still a slight divergence.[2] However, the tyranny of the majority over the minority—of the members over the non-members, or of the majority of members over the minority of members—is less dangerous than the tyranny of a great power, if only because each small State composing the majority will think twice before creating a precedent which might be used against *it* in the future.

Regional arrangements, like the old hegemonic spheres of influence, preserve international law and stability, by restraining intervention by extra-regional powers. But they are free from the anti-legal tendencies of traditional spheres of influence; great powers abandon claims to intervene unilaterally in their spheres of influence, in return for the chance to play an important role in a regional arrangement. Regional arrangements divert the hegemonic ambitions of great powers into less anti-social courses. They are complementary to international law in preserving stability, and should be encouraged by international law. Such encouragement may be found in an extensive interpretation of the powers which they derive from Chapter VIII of the United Nations Charter.

[1] See above, pp. 219–21.

[2] It is in order to prevent this divergence from becoming significant that it is essential to hold that regional agencies cannot take military action against non-members, except in self-defence (strictly defined) or with the approval of the Security Council.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL AND INTERNATIONAL LAW*

By J. E. S. FAWCETT

I

THE Judicial Committee of the Privy Council is a tribunal unique in its history, its composition and its jurisdiction.

The *Curia Regis*, which began to be named the Privy Council by the beginning of the fifteenth century, had, even after the separation of the courts of Common Law and Chancery, acted as a judicial body to deal with matters of public interest which were 'outside the common law, such as alien merchants, maritime or ecclesiastical law, cases in which the Common Law courts had not the power to act efficiently, cases in which the law itself was at fault'.[1] An Order-in-Council of 1495 directed that all appeals from the Channel Islands should go to the King in Council,[2] the beginning of its overseas appellate jurisdiction.

'The Lords of the Council sitting in the Star Chamber', its Court of High Commission for ecclesiastical cases, and the Court of Requests, or minor court of equity for poor persons and specially privileged servants of the King, showed the domestic judicial role of the Council at its most extended in the century before the Civil War. The collision between King and Parliament, and the assault on prerogative rule, ended in a sharp reduction of the judicial power of the Privy Council. But the overseas appellate jurisdiction survived. In 1696 it was ordered that 'all appeals from any plantations be heard as formerly by a Committee who are to report the matters so heard by them to His Majesty in Council',[3] and this was confirmed in a decision of 1724,[4] as was jurisdiction to hear appeals from the Isle of Man in 1716.[5] Just over a century later the Judicial Committee was established in its modern form. In 1832 the Privy Council was constituted the final court of appeal in ecclesiastical causes, and from the Court of Admiralty and Vice-Admiralty Courts in the colonies, and Prize Courts.[6] The Judicial Committee Act 1833, passed 'for the better administration of justice in His Majesty's Privy Council', established a Judicial Committee, and also provided that, in addition to the standing jurisdiction, any matter might be specially referred to it by the Crown for

* © J. E. S. Fawcett, 1968.

[1] Holdsworth, *History of English Law*, vol. I, p. 264.

[2] Ibid., p. 295.

[3] Ibid., p. 292.

[4] *Fryer* v. *Bernard*, [1724] 2 P.Wms. 262.

[5] *Christian* v. *Corren*. [1716] 1 P.Wms. 329.

[6] The ecclesiastical and admiralty jurisdiction was modified, and certain other domestic jurisdiction added, by later statutes.

report and opinion.[1] The Judicial Committee Act 1844 confirmed the overseas, appellate jurisdiction in authorizing the Crown to admit appeals to the Judicial Committee from any court within a British colony or possession abroad. But as British colonies and possessions have one by one become independent, or after independence have become republics, there has been a trend of abolition of appeals to the Privy Council. However, appeals still lie, under Order-in-Council or statute, or by special leave, from the High Courts of Australia and the Australian States; New Zealand; Ceylon; Malaysia;[2] Singapore; Sierra Leone; Jamaica; Trinidad and Tobago; Uganda; Malawi; Malta; Gambia; and Guyana.

In exercising a general appellate jurisdiction in civil and criminal matters, the Judicial Committee may on occasion act in effect as a constitutional court; and in its composition, and in the range of its jurisdiction over many countries, differing in their legal systems and forms of society, it has some of the features of an international tribunal.

What follows is a short survey of its forms of reception of international law, and of its statement and application of specific rules of international law in certain fields: the independence, recognition and jurisdiction of States; the acquisition of territory; treaties; international organizations; and war. No attempt will be made generally to estimate the conformity of Judicial Committee decisions with contemporary international law, if only for the reason that of those to be cited only a bare tenth were rendered after 1945, a period of great development in international law.

But before proceeding to the cases[3] we must describe briefly the character of the Judicial Committee as a judicial tribunal.

II

The conclusions of the Judicial Committee on an appeal to it have always been and remain formally an advice and recommendation to the Sovereign. They are technically an opinion rather than a judgment, and a separate order is made by the King or Queen in Council to give legal effect to the recommendation. Nevertheless, that the Judicial Committee is essentially a court of law has not been questioned at least since the Judicial Committee Act 1833, for

although in form the appeal was still to the King in Council, it was so in form only and became in truth an appeal to the Judicial Committee, which as such exercised as

[1] S. 4.

[2] Since Malaysia does not recognize the Queen as Head of State, the Judicial Committee reports directly to the Yuan-di Pertuan Agong: Malaysia (Appeals to Privy Council) Order, S.T. 2089/1963.

[3] All the decisions that are cited in the following sections are decisions of the Judicial Committee, unless they are otherwise described.

a court of law in reality, though not in name, the residual prerogative of the King in Council.[1]

Thus the connection between the Judicial Committee and the Privy Council is 'no more than nominal' and the orders-in-council, by which the decisions on appeals are implemented, are 'essentially judicial acts' outside 'the field of legislation or . . . of administration of government in any ordinary sense'.[2] Here the Judicial Committee opposed the view expressed by Chief Justice Basnayake of Ceylon that

> When the Queen of England gave up her right to legislate for Ceylon by order-in-council, it must be presumed that she gave up . . . her prerogative right to promulgate any order-in-council having the force of law in Ceylon.[3]

But the independence of Ceylon did not of itself, as a matter either of law or practice, terminate the right of appeal to the Judicial Committee; to hold so would be to confuse the judicial and legislative orders.

The separate identity of the Judicial Committee as a court is confirmed by the provision for appeals from Malawi to lie to it rather than to the Queen in Council.[4]

Two aspects of the practice of the Judicial Committee may be noticed, which suggest comparisons with the International Court of Justice. First, it has traditionally delivered a single opinion, eschewing any publication or even disclosure of the existence of dissenting or separate opinions. It reaffirmed this policy on more than one occasion in the past,[5] but it has recently decided to change it. Two considerations perhaps guided the older practice: that not only the geographical range and the variety, in law and culture, of the cases coming before it, but also its distance, sometimes psychological perhaps as well as physical, required it to endow its decisions with an authority which only a single voice could give. The practice of the Judicial Committee's not being bound by the rule of *stare decisis* may appear to run counter to this, but does not when full weight is given to the first consideration.

[1] *British Coal Corporation* v. *R.*, [1935] A.C. 500.

[2] *Ibralebbe* v. *R.*, [1964] 1 A.E.R. 251, at 257.

[3] *The Queen* v. *Hemapala* remitted to Court of Criminal Appeal, Ceylon for final disposal: [1963] A.C. 859

[4] Malawi Independence Act 1964, s. 5. Contrast the observation of the Judicial Committee on a provision in Canadian statutes enacted by Canada, Ontario and Quebec in 1890 and 1891, that appeal should lie from arbitrators, on certain matters concerning Canadian Indians, to the supreme Court and 'thence to the Privy Council of England, in case their Lordships are pleased to entertain the appeal'. Appeal, said the Judicial Committee, 'lies to Her Majesty and not to this Board' who are 'merely the advisors of the Queen': *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1897] A.C. 199, 208.

[5] e.g. in 1878 it was ordered that the old rule be strictly kept that 'no disclosure be made touching the matters treated of, in council, and no publication made by any man how the particular voices went'.

The delivery of dissenting or separate opinions in the International Court of Justice is an issue on which the Court has never been entirely at ease.[1] It is arguable that, at least in the advisory opinion procedure, such opinions when published serve only to undermine the authority of the Court, and that much of the authority attained by Judicial Committee decisions, given in conditions not wholly dissimilar to those of the International Court, is due to the practice of the single opinion. It is difficult to see how criticism of the reasoning of the majority can be justified in a dissenting or separate opinion.[2] It is also difficult to see why it is not sufficient that dissenting and separate opinions should be simply recorded in the minutes of the Court, for consultation and use by the Court in the future.[3]

A second aspect to be noticed is the approach of the Judicial Committee to abstract questions, which is more cautious than that of the International Court. The problem has arisen in the Judicial Committee on appeals from Canada where questions could be put to the Supreme Court for an advisory opinion.[4] The Judicial Committee pointed out the inconveniences of this process, the possible prejudice to future litigants, and the difficulty or impossibility of defining a principle adequately and safely without ascertainment of the facts to which it is to be applied. Thus,

> The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee . . . is to give it as a court of review such assistance as is within its power. But [for the reasons indicated] in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies.[5]

And in general—

> The advisability of propounding for the consideration of the Court abstract questions or questions involving considerations of debatable fact is, to say the least, doubtful; and it is undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it, or touching matters of such a nature that its answers must be wholly ineffectual with regard to parties who cannot be brought before it—for example, foreign governments.[6]

[1] See M. O. Hudson, *Permanent Court of International Justice* (*1920–1942*), pp. 205–6, for opposition in the 1920 Committee of Jurists to the expression in the judgment of 'reasons for dissent or reservations', and for the proposal in 1929 to have a single judgment of the Court. For a recent statement of the limits that should be set to dissenting or separate opinions see Judge Sir Percy Spender, the President of the Court, in *South-West Africa* cases (*Merits*), *I.C.J. Reports*, 1966.

[2] So Judge Basdevant, in delivering a separate opinion, was careful to say: 'I do not propose, in doing this, to embark upon a criticism of the reasoning of the Court . . . [which] would go beyond the bounds within which an individual opinion ought, in my view, to be kept': *Minquiers and Ecrehos Rocks* case, *I.C.J. Reports*, 1953, p. 47, at p. 74. There is no reason to think that he would have excluded dissenting opinions from this observation.

[3] This appears to have been a practice of the Court before 1926, Hudson, op. cit., p. 588, n. 86.

[4] Supreme Court Act (RSC 1906 c. 139), s. 60. The U.S. Supreme Court has maintained its refusal, first declared in 1793, to give advisory opinions.

[5] *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1914] A.C. 153.

[6] *In re the Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

The International Court in contrast is not deterred by abstract questions and has firmly asserted its competence to answer them.[1]

It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.

The opinion has even been expressed that requests to the Court for advisory opinions should be always stated in abstract terms.[2]

It remains to ask whether the Judicial Committee is a court of the United Kingdom? The Judicial Committee said of itself in 1926:

. . . it is not a body strictly speaking with any location. [It] is not an English body in any exclusive sense. It is no more an English body than it is an Indian body or a Canadian body. . . . We sit as an Imperial court which represents the Empire.[3]

Again,

. . . the Privy Council appeal is part of the judicial system of Ceylon . . . It is not as if the Judicial Committee was in essence an English institution or an institution of the United Kingdom . . . If and when a territory having constitutional power to do so . . . decides to abrogate the appeal to the Judicial Committee from its local courts, what it does is to effect an amendment of its own judicial structure.[4]

The Judicial Committee acts then as a commonwealth tribunal, again exhibiting an international character.

III

What the Judicial Committee denotes as international law or the law of nations[5] appears essentially to be rules which have the general agreement of States. So a rule of immunity of public vessels was applied which 'more

[1] *Admission of a State to the U.N.*, [1948] I.C.J. Rep. 61.

[2] Judge Azevedo, ibid.

[3] *Hull* v. *M'Kenna*, [1926] I.R. 402 at 403–4.

[4] *Ibralebbe* v. *R.*, [1964] 1 A.E.R. 251 at 259. The doubts raised in *British Coal Corporation* v. *R.*, [1935] A.C. 500 interpreting *Nadan* v. *R.*, [1926] A.C. 482 are then laid to rest. In the latter case the Judicial Committee held that Canadian Criminal Code (1888), s. 1025, purporting to abolish criminal appeals to the Privy Council was invalid. The Dominion Parliament, in enacting the Code, had exercised its legislative powers in respect of 'the criminal law . . . including the procedure in criminal matters'; but 'however widely these powers are construed they are confined to action to be taken in the Dominion'. Further, the section was void under the Colonial Laws Validity Act (1865) for repugnancy to the Judicial Committee Act, 1833–44. The first ground was regarded at the Imperial Conference 1926 and in *British Coal Corporation* v. *R.*, [1935] A.C. 500 as resting on the principle that 'according to the law as it was in 1926 a Dominion Statute could not have extra-territorial operation', thus implying that appeal to the Judicial Committee was to a court outside Canada. But since s. 1025 was void for repugnancy to the Colonial Laws Validity Act (1865), the question of its extra-territorial operation could not properly arise: in short, the first ground can be treated as *obiter*. It was said in *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1947] A.C. 127 only that the territorial limitation 'might be regarded as a fetter on the legislative competence of the Dominion or province to deal with the so-called prerogative right of appeal'.

[5] 'International comity' is occasionally used, *The Roumanian*, [1916] A.C. 124.

accurately and logically [than the 'floating island' theory] represents the agreements of nations which constitute international law'[1] and a proposition rejected[2] where 'It has not been established that such a general agreement exists on this subject [extraterritorial maritime jurisdiction] as to satisfy the test laid down by Lord Alverstone . . . '.[3] The rules are variously described as 'generally acknowledged principles of international law',[4] or 'well-understood rules of international law'[5] or 'the doctrine of international law',[6] and sometimes shade off into general principles of law and conflict rules.[7]

But the rules of international law are not foreign law, which must be proved before the court as matters of fact. They are part of the law which the Judicial Committee, like other courts in the United Kingdom, will apply as *lex fori*. So

> The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.[8]

The two qualifications of inconsistency call for comment. The first is a special rule of constitutional law, not adopted in all countries, which does not affect in general the principle of reception of international law, and is in any case largely confined to treaties in its application. The second qualification does not rest upon any known precedent and seems to be self-contradictory; for if the courts treat the relevant rule of international law as incorporated in domestic law, how can they decide inconsistently with it? So a Prize Court though it is a municipal court established under municipal law and therefore 'the law it enforces may . . . in one sense be considered a branch of municipal law',[9] nevertheless gives 'judgements of international force' and is 'guided by general principles of law capable of universal acceptance rather than by considerations of special rules of

[1] *Chung Chi Cheung* v. *R.*, [1939] A.C. 160.

[2] *Naim Molvan* v. *Attorney-General for Palestine*, [1948] A.C. 351.

[3] In *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K.B. 391, Court of Appeal, referring to 'the common consent of civilized nations' and to the requirement that a proposition of law 'has been so widely and generally accepted that it can hardly be supposed that any civilized State would repudiate it.'

[4] *Croft* v. *Dumphy*, [1953] A.C. 156. Compare *The Chancellor*, [1861] 14 Moore 202: 'The rule of the sea is that which must govern the present case'.

[5] *Cook* v. *Sprigg*, [1899] A.C. 572.

[6] *In re Labrador Boundary*, [1927] 43 T.L.R. 289.

[7] *Huntington* v. *Attrill*, [1895] A.C. 150: 'well-recognized principle' that criminal jurisdiction is territorially limited; *Attorney-General for Hong-Kong* v. *Kwok-a-Sing*, [1873] L.R. 5 P.C. 179: 'general principle of criminal jurisprudence' that quality of act is determined by *lex loci delicti*; *Berthiaume* v. *Dastous*, [1930] A.C. 79 at 83: 'If there is one question better settled than any other in international law,' it is that 'the validity of a marriage is determined by the principle *locus regit actum*.'

[8] *Chung Chi Cheung* v. *R.*, [1939] A.C. 160.

[9] *The Zamora*, [1916] 2 A.C. 77; 91.

municipal law'.[1] It must 'ascertain and give effect to a law, which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement.'[2]

The existence of a particular rule of international law and its content must be demonstrated, like any other proposition of law, by reference to certain sources and authorities. The Judicial Committee has said[3] that:

> It is a process of inductive reasoning . . . International law was not crystallised in the 17th century, but is a living and expanding code;

and that the sources and authorities

> include treaties between various States, State papers, municipal Acts of Parliament, and the decisions of municipal courts, and last but not least opinions of jurisconsults or text-books.

After an oblique suggestion that the decisions of international tribunals, and the codification of international law, might be adduced as authorities for its rules,[4] the Judicial Committee found itself

> to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views but to select what appear to be the better views.

Customary international law is not mentioned here, unless it is to be regarded as hidden in 'State papers', and though the Judicial Committee has invoked it on occasion[5] it is inclined to take treaties as best evidence, though not exclusive. So, in considering the precise character of State authority over the marginal sea, it said:

> The doctrine of the zone comprised in the [three-mile] limit owes its origin to comparatively modern authorities on international law. . . . Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a Conference, it is not desirable that any municipal tribunal should pronounce upon it . . . Until then the conflict of judicial opinion which arose in *R.* v. *Keyn* is not likely to be satisfactorily settled.[6]

[1] *The Odessa*, [1916] 1 A.C. 145.

[2] *The Zamora*, at 92. So an order-in-Council 'purporting to prescribe or alter international law' would not be binding on a Prize Court.

[3] *In re Piracy jure gentium*, [1934] A.C. 572: among the sources and authorities relied on were a definition of piracy by the League of Nations Sub-Committee on Codification with government comments; a number of national court decisions including those of the United States; and a large number of jurists both English and foreign from Molloy (1676) to Hall (1924), and the Harvard Research (1932). Statutory definitions of piracy were however rejected.

[4] '. . . in a certain sense there is now an international judiciary in the Hague Tribunal and attempts are being made by the League of Nations to draw up codes of international law'; ibid., at 589

[5] e.g. *In re Labrador Boundary*, [1927] 43 T.L.R. 289 at 294: 'The use of the watershed or "height of land" as a boundary was undoubtedly familiar in British North America at the period in question' (second half of the eighteenth century).

[6] *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1914] A.C. 153 at 174–5.

But custom is recognized as creating rules. So in the matter of capitulations,

> the formality of a treaty is the best proof of the consent and acquiescence of parties, but it is not the only proof, nor does it exclude other proof: and more especially in transactions with Oriental States. Consent may be expressed in various ways; by constant usage, permitted and acquiesced in by the authorities of the State, active assent or silent acquiescence where there must be full knowledge'.[1]

Further, the notion is there adopted that a customary rule may evolve between the States directly concerned with a particular situation or practice:[2]

> . . . at first from the total difference of religious habits and feelings it was necessary to withdraw as far as practicable British subjects from the native courts; then in the progress of time commerce increasing and various nations having the same interest in abstaining from resort to the tribunals of Mussulman law, recourse was had to consular courts, and by degrees the system became general.

But the Judicial Committee is generally inclined to seek a 'universal' rule.[3]

IV

The Judicial Committee has in a number of decisions considered the character of the independence of States, the recognition of governments, and the extent of State jurisdiction and immunities from process.

It has firmly distinguished the independence of a State of any external like authority[4] from its internal sovereignty,[5] so that constitutional limitations on the domestic exercise of sovereignty do not compromise the independence of the State. In dealing with the issue of the continuance of appeals to itself from the courts of Ceylon after independence it said:

> Independence as such did not of course alter the existing corpus of law in Ceylon. . . If it is recognised as it must be that the legislative competence of the Parliament of Ceylon includes power at any time, if it thinks right, to modify or terminate the Privy Council appeal from its courts, true independence is not in any way compromised by the continuance of that appeal . . .'[6]

Further, while a State may limit the exercise of its sovereignty by voluntary undertakings towards other States, there is a rebuttable presumption against its having delegated a power of decision to them.[7]

[1] *Papayanni* v. *Russian Steam Navigation and Trading Co.*, [1863] 2 Moore N.S. 161 at 182.

[2] Compare the test of 'a constant and uniform usage practised by the States in question': *Asylum* case, *I.C.J. Reports*, 1950, at p. 276.

[3] *Hangkam Kwingtong Woo* v. *Lin Fan Fong*, [1951] A.C. 707, discussed below.

[4] The definition is that propounded by Judge Anzilotti in the *Austro-German Customs Union* case, *P.C.I.J.*, 1931, Ser. A/B, No. 41, at p. 57, adopted in effect by the Court.

[5] So the issue in the reference *In re Cape Breton*, [1854] 5 Moore P.C. 259 was not a claim of the islanders to independence, the Judicial Committee noting that the cession of the island to the Crown under the Treaty of Paris 1763 was not contested, but a demand for a representative assembly.

[6] *Ibralebbe* v. *The Queen*, [1964] 1 A.E.R. 251 at 259, 261.

[7] *The Rannveig*, [1922] 1 A.C. 97.

As to the dependent or independent status of foreign territories, the Judicial Committee has in earlier times made its own determination. So, in an appeal in prize arising out of the Crimean war,[1] it observed that

> The political position of the provinces of Moldavia and Wallachia is very anomalous,

that there was, however, evidence of independent administration, and that it was impossible that, by temporary Russian military occupation

> so taken, so continued and so terminated, Moldavia ever became part of the dominions of Russia and its inhabitants subjects of Russia . . . The utmost to which the occupation could be held to amount to was a temporary suspension of the *suzeraineté* of the Porte.

Further, the Wallachian flag flown on ships had been recognized by both Russian and Turkish authorities.

However, it has in recent times acted on the principle that an Executive certificate is, within the limits of the facts which it states, conclusive evidence of the status of a foreign State or territory. So where a letter written in February 1951 by a Secretary of State to the Rulers of the Malay States asserted that 'H.M. Government regard your Highnesses as independent sovereigns in so far as your relations with H.M. are concerned',

> this document was tendered to their Lordships, without objection from the respondents, as containing the necessary and conclusive information from the proper quarter. Their Lordships so accept it and take judicial notice of the fact so certified.[2]

It is a curious fact that the law of England on State immunities has been built largely on decisions relating to rulers in India[3] and Malaya, who have not been recognized as independent by the rest of the world; and it is to be noted that the certificate just quoted is confined to relations between the Malay rulers and H.M. the Queen. In other words, recognition of them as independent rulers would not commit the United Kingdom, for example, to support their admission to membership of the United Nations.

But the anomaly is not perhaps so great as it appears. Many unnecessary abstractions are introduced into the character of independence and sovereignty by the false assumption that either can ever be absolute, and a failure to see that the proper question to be asked is: for what particular purpose is this territory or administration to be regarded as independent or sovereign? The Byelorussian S.S.R. is independent only in the exercise

[1] *The Gerasimo*, [1857] 11 Moore P.C. 88.

[2] *Sultan of Johore* v. *Abubakar Tunku*, [1952] A.C. 318, 340–2.

[3] Here it is doubly curious in view of the Indian Civil Procedure Code 1908, ss. 86, 87, which permitted suit 'against any such Prince or Chief, and any ambassador or envoy of a foreign State, . . . with the consent of the Governor General in Council'. See *Gaekwar of Baroda State Railways* v. *Hafiz Habib-al-Haq*, [1938] L.R. 65 Ind. App. 182; *International Law Reports*, vol. 9, p. 233: no certificate having been given under s. 86, the immunity of the appellant was upheld on the ground that the state railways were owned and managed by the Gaekwar of Baroda and that the suit lay in effect against him.

of the rights of United Nations membership; Canada is not independent in the amendment of certain provisions of her constitution; the Chinese Nationalist Government represents China in the United Nations and other institutions, but exercises no sovereignty over any part of Chinese territory; the 'Six' are no longer independent in the determination of the incidence or level of tariffs; and even the rulers of protected States may be independent or sovereign for some purposes.

The position of the Crown in a protected State has been analysed by the Judicial Committee,[1] drawing instructive lines between treaty rights, domestic law and conflict rules. Article XVI of the Treaty of 1886 between Great Britain and Zanzibar accorded to British subjects 'rights of exterritoriality' in respect of their persons and property. By Order-in-Council under the Foreign Jurisdiction Acts 1843–90, Indian legislation, which as regards property in land, included the Indian Land Acquisition Act 1894, was applicable. In 1896 land owned by the respondent company in Mombasa was compulsorily acquired for the construction of a railway, and it brought suit for compensation. The Judicial Committee pointed out that exterritoriality was a fiction:

> It is reasonable to conclude that the things specified [in the Treaty] show the nature of the immunities desired by and accorded to British subjects—complete personal protection, assurance of satisfactory judicial tribunals, and such enjoyment of his property for himself and for those who claim under him as British law would afford him for British property.

But exterritoriality did not mean that land acquired in Zanzibar by a British subject became English land governed by English law. The notion was used rather to describe a delimitation on the international plane of jurisdiction between the Sultan and the Crown. The Queen became

> an authority in the foreign territory of Zanzibar, though exercising her powers quite independently of the Sultan.

The domestic law of Zanzibar had then two branches: Mahommedan law under the authority of the Sultan and the law, as declared applicable by the Crown under the Foreign Jurisdiction Acts, namely, Indian legislation and in certain circumstances not arising here, English law. Given the *lex rei sitae* as applicable to the claim for compensation for the taking of property, the choice lay then between the Indian Land Acquisition Act 1894 and Mahommedan law. Since the land in issue was owned by a British company, the former would prevail under the Treaty regime, but finding that the Treaty was not applicable to the issues of compensation, the Judicial Committee applied Mahommedan law.

The principle that the Crown exercises its authority in a protected State independently of the ruler entails then a separation of jurisdiction

[1] *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.*, [1901] A.C. 373.

between them. It is doubtful whether this separation was properly observed in a case of removal of certain convicted prisoners from Bahrain to St. Helena.[1] The appellant, a subject of Qatar or Bahrain, had been convicted with others on 23 December 1956 by a special court, set up by the Ruler of Bahrain, on charges of attempted assassination of the Ruler. The Ruler had, after preliminary discussions with his British Adviser, previously requested the British Political Resident that the appellant and others might, if convicted, be removed to serve their sentence in St. Helena. On 19 December two Orders-in-Council[2] were made for this purpose, and in due course a warrant for their removal on one of H.M. ships was issued on 28 December. There were in Bahrain three distinct jurisdictions in criminal matters: the British jurisdiction over persons subject to the Bahrain Order 1952; the jurisdiction of the Ruler; and that of a Joint Court for 'mixed cases', which might, however, under the standing concurrence of the British Political Resident, be tried in the courts of the Ruler. It was not disputed that the appellant was not a person subject to the Bahrain Order 1952; and therefore, whether or not his case was a 'mixed case' and the Judicial Committee did not undertake to decide that question, his trial and sentence came under the jurisdiction of the Ruler and not of the Crown.

The first Order-in-Council purported to extend the Colonial Prisoners Removal Act 1869 to Bahrain.[3] But that Act, designed to operate between any two colonies, naturally covered only prisoners tried and sentenced within the jurisdiction of the Crown.[4] For purposes of the extension of the system of removal of a prisoner to a protected State, the term 'jurisdiction' in Foreign Jurisdiction Act 1890, s. 5, must be understood in the same sense; so that, in the case of Bahrain, a prisoner tried and sentenced under British jurisdiction, or possibly in a Joint Court, would be covered, but a prisoner tried and sentenced in a court of the Ruler would not. The Foreign Office certificate, in answer to questions put by the Judicial Committee, stated

> (*b*) On December 18, 1956 H.M. also acquired legislative jurisdiction in Bahrain to extend the Colonial Prisoners Removal Act 1869 to Bahrain and to exercise the powers

[1] *Abdul Rahman al Baker* v. *Alford*, [1960] A.C. 786.

[2] Bahrain (Removal of Prisoners) Order: S.I. 2031/1956 and Prisoners Removal (Bahrain and St. Helena) Order: S.I. 2032/1956.

[3] Under Foreign Jurisdiction Acts 1890–1913. The Act of 1890 provides that the scheduled Acts may be extended to any country 'in which H.M. has jurisdiction' (s. 5). The Colonial Prisoners Removal Act 1869 was not a scheduled Act, but was added by Foreign Jurisdiction Act. 1913 s. 1.

[4] S. 4 'Any two colonies may, with the sanction of H.M. in Council, agree to the removal of any prisoner under sentence . . . from one of such colonies to the other. . . . The agreement of any one colony with another shall . . . be testified under the hand of the Governor of such colony.'

conferred on Her by that Act in relation . . . to subjects of the Ruler of Bahrain and to subjects of the Ruler of Qatar.

This confuses the two sources of jurisdiction, the English statutes and the authority of the Ruler. H.M. the Queen could not by grant from the Ruler extend the jurisdiction to remove prisoners, conferred by the Colonial Prisoners Removal Act 1869 and Foreign Jurisdiction Acts 1890–1913 read together. If the grant of legislative jurisdiction had been really effective, the two Orders-in-Council need not have been made.

The consequences of recognition of foreign governments were explored by the Judicial Committee in the case of the Chinese aircraft in Hong Kong,[1] and a number of interesting observations made.

The chronology of the main events in the case is important. As Communist power spread in China in the middle of 1949, forty aircraft, owned and operated by the Central Air Transport Corporation, a public corporation of China, were flown into Hong Kong. They remained in the charge of C.A.T.C. employees, who declared their allegiance to the Peking Government on its establishment at the beginning of October 1949. On 4 November the Representation of Foreign Powers (Control) Ordinance was promulgated in Hong Kong directing that 'No person shall function on behalf of any foreign power without the consent of the Governor.' Interim injunctions were granted by the Supreme Court of Hong Kong on 24 and 25 November restraining C.A.T.C. employees from holding or moving the aircraft. On 12 December, shortly after the establishment of the Chinese Nationalist Government in Formosa, it agreed to the sale of the aircraft to a partnership of two United States citizens. At this time, the Chinese Nationalist Government was still recognized by the United Kingdom as the *de jure* Government of China,[2] and as such was, under Chinese law, capable of giving a good title on sale, since the aircraft were in State ownership. On 19 December the partnership transferred the aircraft by a bill of sale to the appellant corporation. On 6 January 1950 the United Kingdom recognized the Peking Government as the *de jure* Government of China, and ceased to recognize the Chinese Nationalist authorities as a government in any respect.

In proceedings by the appellant corporation to obtain possession of the aircraft the Supreme Court, Gould J., dissenting, held the sale to be invalid, as being a disposal of Chinese public property, dictated by spite against the new government, and inimical to the interests of China.

The Judicial Committee started from the position that at the critical

[1] *Civil Air Transport Inc.* v. *Central Air Transport Corporation*, [1952] 2 A.E.R. 733.

[2] In a Foreign Office certificate of 13 March 1950, it was said that while the Peking Government was in effective control from 1 October 1949, no recognition had been accorded to it by the United Kingdom before the *de jure* recognition of 6 January 1950.

date, namely, that of the sale on 12 December, the aircraft were lying in territory foreign to China. In these circumstances only the *de jure* government was capable of disposing of them by sale, and could give a good title unless the Peking Government could establish a right of possession, through the agency of the C.A.T.C. employees. This raised two issues: the retroactive effect of its recognition as *de jure* government of China, and the legal character of the physical control of the aircraft by the C.A.T.C. employees. On the first issue, the Judicial Committee said:

> It might be too wide a proposition to say that the retroactive effect of *de jure* recognition must in all cases be limited to acts done in the territory of the government so recognised, for the case of a ship of the former government taken possession of by insurgents on the high seas, and brought into a port which is under the control of the *de facto* government, would have to be considered.

and presumably also that of the aircraft, if they had been flown from Hong Kong into China before 12 December. Nevertheless,

> Primarily . . . retroactivity of recognition operates to validate acts of a *de facto* government which has subsequently become the *de jure* government, and not to invalidate acts of the *de jure* government.

But it was held on the second issue that there was no valid possession of the aircraft by the Peking Government, which could give effect to the principle of retroactivity. The physical control of the aircraft by the C.A.T.C. employees could not, in face of the Ordinance of 4 November and the injunctions, constitute lawful possession by them on behalf of the Peking Government.[1]

The Judicial Committee added two observations on the international recognition of a sale of public property by a government later overthrown. The first is a qualification of the rule that the *de jure* government alone may dispose of property situated outside its territorial jurisdiction:

> If the previous government sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces, acting on behalf of what is already a *de facto* new government, the sale may be valid if the insurgents are afterwards defeated, and possession of the goods is regained by the old government. But if the old government never regains the goods and the *de facto* new government becomes recognised by H.M.G. as the *de facto* government, purchasers from the old government will not be held in H.M. courts to have a good title after that recognition.

The formulation is not without difficulty for it not only makes the validity of the sale depend on the uncertainties of future recognition, but

[1] *Semble*, any title that the Peking Government might have asserted in the proceedings in Hong Kong was 'manifestly defective' within the principle stated in *Juan Ysmael* v. *Republic of Indonesia*, and so it was not in fact impleaded in the proceedings. It would follow that the Supreme Court of Hong Kong (Jurisdiction) Order (10 May 1950), which declared that any proceedings concerning the aircraft were not to be barred by reason of their impleading a foreign State, would have had no field of operation.

leaves it unclear at what time title to the goods will pass. If it passes on the agreement of sale, then the defeat of the title, by the subsequent recognition of the *de facto* government as the *de jure* government, would be a case of retroactive invalidation of the act of a *de jure* government.

The second observation contains an enunciation of public policy. While the act of a lawful foreign government disposing of property situated within its jurisdiction must be recognized and given effect to in the courts, it is suggested that it need not be if there is an element of conversion or bad faith:

> A government's policy in buying or selling chattels which it owns is not subject to the review of foreign tribunals, and whether its action is against the interests of those whom it is supposed to serve is a political question. . . . [A] government is certainly not a trustee in these matters in any legal sense. The right in municipal law to follow property, which is subject to a trust, into the hands of third parties cannot have any application here. . . . At the same time their lordships must not be understood to reject the possibility of our courts refusing . . . to recognize the validity of the disposal of State property by a government on the eve of its fall e.g. by a despot, who knows that previous recognition is just being withdrawn, where it is clear that his purpose was to abscond with the proceeds, or to make away with State assets for some private purpose.

This could raise intriguing questions on bank deposits by despotic rulers with interests in oil, not least of the proper distinction between State and private assets.

That State jurisdiction is primarily territorial has been affirmed by the Judicial Committee in the fields of criminal law and currency.

The important distinction between the statutory or other *basis* of jurisdiction and the *exercise* of that jurisdiction is shown in two cases.[1] In the first it was said that

> . . . a statute creating an offence, and imposing a penalty for it, should be so construed as to apply only to those persons, who by virtue of residence or in some cases, citizenship or nationality, are regarded as subject to the jurisdiction of the State which has enacted the statute.

In the second the 'well-recognised principle' is invoked that

> crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State government, or of someone representing the public, are local in this sense that they are only cognizable and punishable in the country where they were committed.

Similarly, the denomination of a currency and the definition of the area

[1] *Naim Molvan* v. *Attorney-General for Palestine*, [1948] A.C. 351, 367; and *Huntington* v. *Attrill*, [1893] AC 150, 156. See also *Attorney-General for Hong Kong* v. *Kwok-a-Sing*, [1873] L.R. 5 P.C. 179: 'The general principle of criminal jurisprudence is that the quality of the act done depends on the law of the place where it is done.'

in which it is legal tender are determined by the law-making authority by which it is issued. So:

> The power to determine what is lawful money is a power exercisable by the legislature of such a country [Queensland, a self-governing colony] . . . The government of a self-governing country, using the terms appropriate to its own monetary system, must be presumed to refer to that system, whether or not those terms are appropriate to refer to another system also.[1]

And where Queensland debentures, issued in 1895 and under consideration in the case, named pounds sterling as money of account thereby raising the question whether English money or Queensland money was intended, the Judicial Committee stressed 'the vital distinction between the two monetary systems in that they depend on different law-making powers'. Dealing with the same question in a later case it said:

> They may . . . bear the same denomination and have the same value at the date of issue of the security under consideration, but they were none the less potentially different.[2]

The qualification 'sterling' is important in the evolution of the units of account, in which the pound was variously expressed, for it points to the necessary distinction between money of account and units of account. In 1895 the units of account, in which the pound was denominated, consisted of gold sovereigns, which under the coinage Act 1870 were legal tender throughout H.M. dominions, wherever minted; and of currency notes issued for local circulation in a number of territories; thus, for example, Australian notes were never legal tender in the United Kingdom. But after 1931, though gold sovereigns did not cease to be minted, and though the required Proclamation under the Coinage Act 1870, declaring them to be no longer legal tender, has never been issued,[3] they were no longer currency in circulation. So 'pounds sterling' as money of account in 1938 were held to mean English pounds, since the only units of account answering to that denomination were English notes and coins.[4]

[1] *Bonython* v. *Commonwealth of Australia*, [1951] A.C. 201, 222.

[2] *National Bank of Australasia Ltd.* v. *Scottish Union and National Insurance Co. Ltd.*, [1952] A.C. 493. It may be noted that the Coinage Act 1870, s. 6, recognizes the separate existence of 'the currency of some British possession'. For 'separate currencies' of States members of the I.M.F., see I.M.F. Agreement Article XX, section 4*g*. The potential difference became actual in differential exchange rates between the U.K. pound, on the one hand, and the New Zealand and Australian pounds on the other, one of the matters in issue in *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.*, [1934] A.C. 122, House of Lords. See also *Auckland Corporation* v. *Alliance Assurance Co.*, [1937] A.C. 587, where the Judicial Committee followed the former case in declaring New Zealand coupons and debentures to be payable in the currency of the place of payment (London by option) viz. in English pounds, without allowance for exchange depreciation of New Zealand pounds.

[3] So they may be 'legal tender' in the sense of a foreign statute making counterfeiting an offence: *In re Paris*, [1957] Italy, *Corte di Cass.*, *International Law Reports*, vol. 24, p. 48.

[4] *De Bueger* v. *J. Ballantyne & Co.*, [1935] A.C. 460, where Lord Wright stated that 'money of account' should refer to a currency, and 'units of account' to its denominations. See also

Jurisdiction over ships on the high seas was considered in connection with the seizure of the motor-vessel *Asya* carrying immigrants to Palestine in contravention of Palestine ordinances.[1] On interception by one of H.M. destroyers on the high seas off Palestine, the *Asya* hoisted first a Turkish flag and then a Zionist flag. A boarding party found no passenger list and no evidence of any registration of the vessel, and brought it into Haifa, where it was forfeited under the applicable ordinance. To the invocation by the appellant owner of the vessel of 'the freedom of the open sea', the Judicial Committee replied, first, that the freedom was not 'unqualified by place or circumstances', and that there was not at that time such general agreement on what has come to be known as contiguous zone jurisdiction as to constitute applicable rules of international law. Secondly, it said:

> the freedom of the open sea, whatever those words may connote, is a freedom of vessels which fly, and are entitled to fly, the flag of state which is within the comity of nations . . . the ASYA could not claim the protection of any State nor could any State claim that any principle of international law was broken by her seizure.

Finally, it was added that the bringing of the vessel in the territorial sea and port of Palestine under naval compulsion

> whether or not it was a breach of any principle of international law . . . was not done or purported to be done under the authority of the Ordinance.

The decision is doubtless to be confined in effect to the order for forfeiture of the vessel, which was found to be justified by the express terms of the ordinance. But the legal basis of the seizure of the vessel on the high seas remains obscure. It is explicitly stated that it was not the ordinance, though the seizure could, at least after the entry into force of the Territorial Sea Convention, be regarded as a lawful seizure under Article 24 (1) (*a*) to prevent infringement of immigration regulations. But the attitude taken by the Judicial Committee towards contiguous zone jurisdiction is negative. It was said that no customary rule of international law could be invoked to show that the seizure was unlawful; was it then to be implied from the variations and uncertainty of the practice that right of seizure for the purpose of immigration control might be justifiably asserted? Apparently not, for apart from the fact that the United

Bonython v. *The Commonwealth*, [1947–8] 75 C.L.R. at 603 *per* Latham C.J. ' "Sterling" means lawful English currency as distinct from a Dominion or Colonial currency, which is established independently of English law.'

[1] *Naim Molvan* v. *Attorney-General for Palestine*, [1948] A.C. 351. The Immigration Ordinance 1941, as amended by Defence Regulations (1945), s. 12 (3), provided that 'the master, owner and agent of a vessel . . . are all deemed to have abetted the unlawful immigration of any person . . . who is proved to have been on board the vessel . . . in Palestine or *in the territorial waters thereof*, whether *that person or the vessel . . . came there voluntarily or not*, unless it is proved that that person did not enter or attempt to enter Palestine and did not intend to do so' (italics added). Forfeiture of the vessel was mandatory on proof of contravention of the Ordinance.

Kingdom had not at that time ever claimed for itself or for territories under its administration, a contiguous zone jurisdiction for that purpose, the Judicial Committee had recourse to the flagless status of the vessel. But it seems that this, as formulated, is too easy a solution. It is true that, if the vessel is not registered in any State, or registration has been cancelled, there is no State which can intervene in right of the flag and assert a claim. But it by no means follows either that the seizure is therefore lawful or that there is no means of redress, if it is unlawful. The absence of registration does not make the vessel *res nullius*, a prey to the first comer; and intervention, if the seizure is unlawful, is open to the State of nationality of the owner, whose rights must be affected.

With regard to immunities from judicial process, the Judicial Committee has made an effort[1] to solve the problem of how to determine whether a foreign State or government is impleaded in the proceedings, a problem left in some confusion in other courts. Two extreme solutions have been advanced: that the bare assertion by a foreign government of an interest in property, subject of an action, compels the court to decline jurisdiction; and that the foreign government must be required to prove its interest.[2] The Judicial Committee offered a middle course, saying:

> A foreign government claiming that its interest in property will be affected by the judgement in an action, to which it is a party, is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to

[1] *Juan Ysmael* v. *Government of Republic of Indonesia*, [1954] 3 A.E.R. 236. For other decisions of the Judicial Committee on immunities, rendered on established lines see *Chung Chi Cheung* v. *Rex*, [1939] A.C. 160: rejection of the 'floating island' concept of ships, since the immunities of public vessels depend 'not upon an objective territoriality, but on implication of domestic law'; *Sultan of Johore* v. *Abubakar Tunku*, [1952] A.C. 318: submission of a foreign sovereign to the jurisdiction at first instance binds him to accept jurisdiction of appellate court, and review *obiter* of English proceedings where the immunity of a foreign State or government is questionable (proceedings concerning State-operated vessels engaged in trade; and real property situated in England) or has been denied (proceedings concerning trust property in the administration of the court); *Imperial Japanese Government* v. *P. and O. Steam Navigation Co.*, [1895] A.C. 644: Japanese Government, as plaintiff in Consular Court established under treaty with Great Britain, remained immune from counterclaim.

[2] For the first solution see *The Jupiter*, [1936] P. 236, Court of Appeal, *per* Scrutton L.J.: 'This writ requires a foreign sovereign to appear in these to defend what he alleges to be his property, and by the principles of international comity the courts of this Kingdom do not allow such steps to be taken against foreign sovereigns'; *El Condado* (No. 1), [1937] Scotland, Greenock Sheriff Court, A.D. 1938–40, No. 99: 'where the sovereign State recognised by H.M. assert [*sic*], whether rightly or wrongly that they have an interest in the ship or anything else, the court cannot inquire into the correctness of the statement that they have an interest in the vessel, but must decline jurisdiction. . . . Where an abuse is made of this right, then the remedy . . . is through diplomatic channels'. This line of reasoning was doubted in *The Cristina*, [1938] 1 A.E.R. 719 House of Lords by Lord Wright at 731, and by Lord Maugham at 738. The second solution was adopted in *Haile Selassie* v. *Cables and Wireless Ltd.* (No. 1), [1939] 1 Ch. 839 Court of Appeal, on the ground that where 'the issue in the action is whether or not the property belongs to the plaintiff or the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that that

satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relation to the foreign government's claim.

In short, the foreign State or government must make a prima facie case for its being impleaded. It will be noticed that the various decisions speak loosely of both title and interest, but they appear in general to be directed to the wider concept of interest.

V

In the acquisition of title to foreign territory by the Crown, and its consequences, the doctrine of 'act of State' rears its ugly head. In Judicial Committee decisions we can discern the influence of two ancient principles. The first is a unitary conception of Crown title to land, in which there is no individual ownership, except by the King himself, all proprietary rights being forms of tenancy from him.[1] The distinction between *imperium* and *dominium* over territory, derived by Grotius from the civil law, has then no place.[2] This principle was fortified when issues of title to land arose in territories in Africa where customary law was not dissimilar:

> The notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign. Obviously such a usufructuary right, however difficult to get rid of by ordinary methods of conveyancing, may be extinguished by the action of a paramount power which assumes possession or the entire control of the land.'[3]

The second principle is that the King, like any other feudal lord, could not be sued in his own courts.[4]

A further factor in many of the decisions is that they deal with situations that were anomalous in terms of English law and even of international

title is being questioned. It would be a strange result if a person claiming property in the hands of, or a debt alleged to be due by a private individual in this country, were to be deprived of his right to have his claim adjudicated by the court because the claim to the property, or the debt had been put forward on behalf of the foreign sovereign.' See for a similar approach *Hannes* v. *Kingdom of Roumania Monopolies Institute*, [1940] New York, Supreme Court, A.D. 1938–40, No. 72.

[1] 'Every acre of English soil and every proprietary right therein have been brought within the compass of a single formula which may be expressed thus: *Z tenet terram illam de . . . domino Rege*', Pollock and Maitland, *History of English Law*, vol. 1, p. 210.

[2] See D. P. O'Connell, *International Law*, vol. 1, p. 464, and *U.S.* v. *Percheman*, [1833] 32 *U.S.* 51 *per* Chief Justice Marshall: 'A cession of territory is never understood to be a cession of the property belonging to the inhabitants.'

[3] *Sobhuza II* v. *Miller*, [1926] A.C. 518 at 525; B.I.L.C. 1. 663. Compare *State of Gujarat* v. *Vora Fiddali*, [1964] A.I.R. 1043, (Supreme Court of India) for parallel reasoning.

[4] Pollock and Maitland, op cit., p. 502: 'He [the King] cannot be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his court is, we may say, an accident.'

law—the 'Oriental factories', the Indian states, some larger than France and some smaller than English counties, and African communities scattered over territories, vast in area but without central government.

That acquisition of title to or control over territory by the Crown is an 'act of State', in the sense that the act or agreement on which it rests is not justiciable in the courts, is common ground for all the decisions.[1] In a leading decision[2] the Judicial Committee found that the seizure of the Raj of Tanjore, including immovable and movable property of the Rajah, was

> an exercise of sovereign power effected at the arbitrary discretion of the [East India] Company by the aid of military force[3]

and, by invoking the principle of subsequent ratification by the Crown, removed it into the area of 'act of State'. Two arguments were rejected: that the basis of the seizure was escheat to the Crown of the Raj and its property upon the death of the Rajah,[4] and that a distinction must be made between the public and private property of the Rajah. The distinction was seen as pointless, since in the view of the Judicial Committee:

> . . . the property now claimed by the respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion.[5]

The rejection of the distinction reflects the unitary conception of Crown title to land.

[1] e.g. The Treaty of Cession of Lagos (1861) was 'act of State by which the British Crown acquired full rights of sovereignty over Lagos. In these circumstances, the courts of law will not take it upon themselves to construe the treaty': *Okeyan and others* v. *Adele*, [1957] 2 A.E.R. 785, 788. Compare *Naim Molvan* v. *Attorney-General for Palestine*, [1948] A.C. 351 (provisions of the Palestine Mandate 'assumed' by the Judicial Committee to be justiciable, and construed, only for purposes of argument).

[2] *Secretary of State for India in Council* v. *Kamachee Boye Sahaba*, [1859] 7 Moore I.A. 476; B.I.L.C. i 543. Tanjore was a petty State under protection of the Crown by treaties of 1787, 1793 and 1799.

[3] Not in fact used: for a similar seizure 'if not *flagrante* yet *nondum cessante bello*' also declared an act of State see *Elphinstone and Robertson* v. *Bedreechund*, [1830] 1 Knapp 316. For a general definition of act of State see *Eshugbayi Eleko* v. *Administering Government Officer, Nigeria*, [1931] A.C. 662.

[4] Compare the resumption by the Crown of certain tenures by operation of law, held not to be an act of State: *Foster* v. *Secretary of State for India in Council*, [1879] L.R. Ind. App. Supp. vol. 10.

[5] Applied to closely similar facts in *Rajah Salig Ram* v. *Secretary of State for India in Council*, [1872] L.R. Ind. App.; B.I.L.C. i. 576. The distinction was, however, accepted in *Ex-Rajah of Coorg* v. *East India Company*, [1860] 29 Beav. 300, Court of Chancery, where the Master of the Rolls allowed the seizure of promissory notes payable to the plaintiff to be 'act of State' only because they were held by him 'in his public character'.

Two approaches are made in Judicial Committee decisions to the effect of the acquisition of title to territory, as an act of State, upon existing property rights: the extension of the principle, that acts governed by international law may not be justiciable in the courts, to acts of the Crown which are in doctrine governed by domestic law; and the adaptation of the international law of State succession to extend the power of the Crown under municipal law to modify or extinguish existing property rights.

The first approach appears in a decision,[1] which directly followed that in *Kamachee Boye Sahaba*. Between 1889 and 1893 Sigcau, the Paramount Chief of the Pondos, had granted four concessions to the appellants, but apart from some search for graphite they never entered into possession of the lands covered, or exercised the concession rights. In 1894 Sigcau executed a cession of Eastern Pondoland, situated a hundred-odd miles south-west of Durban, to the Crown, and there followed legislation (Act V of 1894) in Cape Colony by which the ceded territory was annexed to it. The concessions granted to the appellants were, however, not recognized, and they had sought a declaration of rights under the local Crown Liabilities Act 1888, and damages. The Supreme Court of the Cape gave judgment against them. The Judicial Committee held that the Act conferred no power on the courts to make a declaration of right in such case, but chose wider grounds on which to dismiss the appeal.

> The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State and treating Sigcau as an independent sovereign—which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which municipal courts administer.[2]

It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory.[3] All that can properly be meant by such a proposition is

[1] *Cook* v. *Sprigg*, [1899] A.C. 572; B.I.L.C. ii. 279. It is arguable that the concessions were public acts rather than private contracts, that they were terminated by the cession of Pondoland to the Crown, and that, given the fact that the concessionaires had not operated them in any degree, no acquired rights survived the cession. Such an argument was, however, rejected in *re Southern Rhodesia*, [1919] A.C. 211, at 235–6. For the termination of a public office by cession of territory see *Asrar Ahmed* v. *Durgah Committee*, [1947] A.I.R. P.C. 1; 131 L.R. 41 (grant of hereditary office of Mutawalli (secular head) of Mahommedan shrine in 1813—cession of granting State to British Crown in 1818).

[2] The punctuation as printed is surely wrong.

[3] See *German Settlers in Poland* case, *P.C.I.J.*, 1924, Ser. B, No. 6, p. 36: 'Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German civil law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished.' Compare also *Sammut* v. *Strickland*, [1938] A.C. 678, 701: 'Where . . . the territory was acquired by cession or conquest . . . there was an absolute power in the Crown, so far as was consistent with the terms of cession . . . to alter the existing system of law, though until such interference the laws remained as they were before the territory was acquired by the Crown.'

that according to the well-understood rules of international law a change of sovereignty ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.

It added that there was no evidence of 'any bargain by the British Government that Sigcau's supposed[1] concessions should be recognized', and that even if there had been, it could only have been enforced 'by sovereign against sovereign in the ordinary course of diplomatic pressure'. But the reasoning is unsound. The continuance of property rights in the ceded territory depends upon a rule of international law, which the decision acknowledges; but their precise character and their enforceability are matters of municipal law, of the predecessor and the successor State, which must as such be within the competence of the courts of the territory to determine, though there may be a rule of domestic law which precludes their enforcement. All that the decision offers is an alleged rule of incompetence to determine their character or enforceability. Yet in a decision given two years earlier[2] the Judicial Committee had insisted that acts on behalf of the Crown in the ceded territory were subject to rules of domestic law. The Governor of Cape Colony had by special proclamation ordered the arrest and detention without trial of Sigcau in Pondoland. This action was defended by the executive on the basis of the annexation, but the Judicial Committee held that it was *ultra vires* under the existing laws of Cape Colony. The suggestion[3] that the different line taken in *Sigcau* v. *Sprigg* was due to personal liberty being in issue is hardly adequate, at least there is little in the stated motivation of the decision to support it.

The second approach, again influenced it seems by the unitary conception of Crown title to land,[4] comes near to denying that property rights survive a change of sovereignty at all. They are seen to be derived from municipal law, but the legal discontinuity, involved in the change of

[1] They had been challenged in the courts below for uncertainty and for lack of *vires* of Sigcau to grant them.

[2] *Sigcau* v. *Sprigg*, [1897] A.C. 238, where it was said that Act V of 1894 does no more than authorize the governor 'to transplant to the new territories, and enact there, laws statutes and ordinances, which already exist and are operative in other parts of the colony'. Compare also *Eshugbayi Eleko* v. *Administering Government Officer, Nigeria*, [1931] A.C. 662; Act of State 'as applied to acts of the Executive directed to subjects within the territorial jurisdiction has no special meaning and can give no immunity from the jurisdiction of the court to inquire into the legality of the act'. It is clear from the judgment that 'subject' includes anyone owing temporary allegiance.

[3] E. C. S. Wade, 'Act of State in English Law: its relations with International Law', this *Year Book*, 15 (1934), p. 38.

[4] Compare *Dalmia Dadri Cement Co.* v. *Income Tax Commissioner*, [1958] India, Supreme Court, A.I.R. 820 *per* Aiyar J.: 'In law the process of acquisition of new territories is one continuous "act of State" terminating in the assumption of sovereign powers *de jure* over them by the new sovereign and it is only thereafter that rights accrue to the subjects of these territories as subjects of that sovereign'; cited by S. K. Agrawala, 'The Doctrine of Act of State and State succession;' *International and Comparative Law Quarterly*, 12 (1963), p. 1399. See also *Sirdar Baghwan Singh* v. *Secretary for India in Council*, [1874] L.R. 2 I.A. 38; B.I.L.C. ii. 582.

sovereignty, places them at best in suspense and dependent for enforcement on positive recognition by the new sovereign. So:

> When a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts of the new sovereign only such rights as that sovereign has, through his officers, recognized.[1]

A decision, given a few years earlier,[2] makes enforcement virtually dependent on new grant:

> The relation in which they [the respondent proprietors] stood to their native sovereigns before this cession,[3] and the legal rights they enjoyed under them, are save in one respect irrelevant matters. They could not carry on under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied, or by legislation, chose to confer upon them.[4]

It is not, however, explained what kind of agreement could create such enforceable rights, and still less from what acts such an agreement could be implied. In the Treaty of Waitangi (1840), by which there was a complete cession of 'all rights and powers of sovereignty' by the Maori chiefs to the Crown, there was at the same time an explicit confirmation of existing private or communal rights in Article 2: 'H.M. the Queen . . . confirms and guarantees to the chiefs and tribes of New Zealand, and to the respective families and individuals thereof, the full exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties, which they may collectively or individually possess.'

Yet the Judicial Committee held[5] that such rights cannot be enforced in the courts except in so far as they have been incorporated in municipal law. The appellant then had to refer the court to some statutory recog-

[1] *Vajesingji Joravarsingji* v. *Secretary of State for India*, [1924] L.R. 51 Ind. App. 357; B.I.L.C. ii. 642.

[2] *Secretary of State for India in Council* v. *Bai Rajbai*, [1915] L.R. 42 Ind. App. 229; B.I.L.C. ii. 631.

[3] Cession of December 1860 by which the Maharajah of Gwalior transferred 'to the British Government in full sovereignty the whole of His Highness' possessions in the Panch Mahals, comprising the lands in issue. It was a condition that "each government shall respect the conditions of existing leases until their expiry".'

[4] 'The moment the cession is admitted, the appellants necessarily became petitioners and have the onus cast on them of showing the acts of acknowledgement': *Vajesingji Joravarsingji* v. *Secretary of State for India*, [1924] L.R. 51 Ind. App. 357.

[5] *Hoani te Heu Heu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308: Agreement by predecessor of respondent land board with a company for exploitation of timber on Maori lands—subsequent default by company and assignment of rights and obligations to respondent by statute—respondent sought to make sums due repayable by Maori landowners and chargeable on their lands.

nition of the right claimed by him, if he was to succeed in limiting the effect of a New Zealand statute, the Native Purposes Act 1935. Here the express agreement to maintain individual and collective property rights was procedurally excluded by the rule requiring the statutory incorporation of treaty provisions creating or affecting rights under domestic law. But on the hypothesis, which this approach follows, that the Treaty of Waitangi was an agreement binding Great Britain on the international plane, the failure to incorporate its terms in statute would not relieve Great Britain of its obligations towards the Maori people in respect of their lands. The question then arises what these obligations were, and whether in particular Article 2 created a permanent regime for Maori lands: was the expression 'full exclusive and undisturbed possession' to be read as operating in perpetuity, or was it vulnerable like other rights in land to legislative changes? Counsel for the appellant appears to have argued somewhat on the lines of the first interpretation here suggested.[1] The Judicial Committee rejected this argument saying:—

> As regards the appellant's argument that the New Zealand legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the Treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the native lands and, in any event, even the statutory incorporation of the second article of the Treaty in the municipal law would not deprive the legislature of its power to alter or amend such a statute by later enactments.

This is a clear adoption of the second suggested interpretation. But it is cast in terms of the character of legislation in the British system, rather than of the intended scope of Article 2 itself. In short, it is an assertion of the supremacy of statute.[2]

A different form of cession was made by the people of Malta. The Court of Appeal in Malta had come to the conclusion that Malta was acquired not by cession but by 'compact between the inhabitants and the Crown' and 'voluntary acceptance by the people of Malta (allied with the Crown against France which had acquired sovereign authority) of British protection'. However, the Judicial Committee[3] rejected any such distinction between kinds of cession in the common law or statute law. Internationally sovereignty confirmed by the Treaty of Paris (1814) had been acquired,

[1] He 'referred to a number of New Zealand statutes to show that for 95 years there had been a consistent policy in protecting the natives and giving them to the full the rights which it was contemplated they should get under the Treaty of Waitangi. The Treaty was handed down as a sacred trust and the powers given by the Constitution Act (1852) were all subject to that intention;' ibid., 314, 315.

[2] Compare *In re Southern Rhodesia*, [1919] A.C. 211, 240: 'The Crown has not assented to any legislative act by which the declaration of its will has been restricted to one definite form.'

[3] *Sammut* v. *Strickland*, [1938] A.C. 678, 698, 701.

not by conquest or by cession 'from a sovereign power', but by voluntary cession, a rare case 'neglected by text-book writers and not noticed by the legislature'. However, the terms of cession in so far as they were to be found in The Royal Declaration of 1813

> gives no support to the view that there was a promise, still less a 'pact' which would involve the grant of representative institutions with substantial law-making powers to the Maltese people

and therefore the question of the extent of the Royal Prerogative, and in particular the resumption under it of legislative power in Malta, is 'a pure question of English common law'.

Finally, we must notice a case[1] where the terms of cession fell short of a grant of territorial title, but the rights and privileges accorded were, nevertheless, assimilated to those acquired by conquest or cession for purposes of the Foreign Jurisdiction Act (1890),[2] including a right 'to recognize or not to recognize existing titles to land'. But the severity of such principles has been moderated in part by the fact that in practice the Crown has respected and maintained existing property rights after cession or annexation of territory, at least pending legislation required in the general interest. Crown title has been said by the Judicial Committee to be:

> throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognized.[3]

More recently this has begun to be built into a presumption:

> In inquiring however what rights are recognized, there is one guiding principle. . . . The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected . . . and the courts will declare the inhabitants entitled to compensation according to their interests [in case of compulsory acquisition of land] even though those interests are of a kind unknown to English law.[4]

The impression left by the numerous decisions on acquisition of title to territory by the Crown, whether by a form of cession or by annexation, is one of a persistent ambiguity, and a certain opportunism, in the applications of international law and constitutional law. Controlling perhaps

[1] *Secretary of State for India* v. *Sardar Rustam Khan*, [1941] A.C. 356: Agreement of February, 1903 by which the Khan of Kalat ceded 'in perpetuity. . .the entire management of the Nasirabad Niabit [district] absolutely and with all the rights and privileges, state or personal . . . and all other powers of administration'. Held, that the transaction was not a commercial contract as argued by the respondent, but 'in fact a perpetual lease of territory at a quit rent. . . . As the cession takes the form of a lease, the territory does not pass so as to become part of the British Dominions but still remains Kalat territory.'

[2] Similarly in *Sobhuza II* v. *Miller*, [1926] A.C. 518 it was said that the jurisdiction of the Crown in a colonial protectorate is 'indistinguishable in legal effect from what might be acquired by conquest', and that Orders-in-Council made in its exercise might be regarded as acts of State or as covered by the Foreign Jurisdiction Act 1890.

[3] *Amodu Tijani* v. *Secretary, Southern Nigeria*, [1921] 2 A.C. 399.

[4] *Okeyan* v. *Adele*, [1957] 2 A.E.R. 785.

have been the anomalous situations, not wholly domestic nor strictly international, with which the Judicial Committee has had to deal, and the traditional conceptions of Crown title to land and immunity from process, by which it has been influenced.

We may venture the following conclusions on the effect of the various decisions:

1. The acquisition of title to territory by the Crown is to be regarded as an act of State, not justiciable in the courts.
2. The effect of acquisition of title is comprehensive in that existing rights, governed in principle by municipal law, are equally affected.
3. Existing property rights, and probably other private rights, will be enforced in the courts if they have been recognized by legislation or some other official act, but their recognition in the agreement of cession will be insufficient for this purpose, unless it has been given statutory form.
4. There is a presumption that existing property rights are recognized and respected by the Crown.
5. The modification or extinguishment of such rights may be effected by normal processes of the domestic law,[1] as extended to the ceded territory.

In determining the extent of territorial claims between British territories, the Judicial Committee has applied principles of international law, proceeding rather as the United States Supreme Court would do on claims between states of the Union. The question was referred to it[2] of 'the location and definition of the boundary as between Canada and Newfoundland in the Labrador peninsula under the Statutes, Orders in Council, and Proclamations'.

It applied first the criteria of geographical and administrative unity and effective occupation:

> Labrador, like Newfoundland, was to be a base for fishing and a nursery of British seamen. But although this was the principal motive of annexation, it does not follow that it was the measure of the grant. . . . The salmon fishery could only be fully protected by the grant of jurisdiction over the rivers and inland lakes as well as over the seashore.

It then, citing Hall, Westlake and Lawrence, invoked 'the doctrine of international law by which the occupation of the sea-coast carries with it a right to the whole territory drained by the rivers which empty their waters into its line'. Finding that the various legislative instruments had established 'a government on the coast, with power to administer justice,

[1] Excluding, however, the exercise of a Crown right of preemption where that exercise has been made statutory: *Nireaha Tamaki* v. *Baker*, [1901] A.C. 561.

[2] Under Judicial Committee Act 1833, s. 4: *In re Labrador Boundary*, [1927] 43 T.L.R. 289.

to imprison offenders, to encourage trade, and to erect forts for the purpose of defence', it had to determine the extent of the 'coast', and said:

> With regard to the limit in depth of the country which may be described as 'coast' where that term is used in the wider sense, [Gold coast, Coromandel Coast] it is argued that the natural limit is to be found (in the absence of special circumstances) in the watershed, which is the source of the rivers falling into the sea at that place, and there is much to be said in favour of that view.

The choice of the watershed as a boundary was consistent with the doctrine of international law described and was justified as a customary device of boundary settlement, and by its practicality.[1]

The Judicial Committee has also held that grants of land to individuals are a form of effective occupation as a basis of sovereignty. Although British Honduras was not formally annexed as a British colony until 1862,

> the fact, which is fully established, that grants of lands were made by the Crown as early as the year 1817, affords ample evidence that in that year at least the Crown had assumed territorial dominion in Honduras.[2]

Finally, on the admissibility of maps as evidence in the settlement of territorial claims, the Judicial Committee has rejected the idea that official maps can operate as an estoppel or preclusion against a government; but they may be admitted as evidence of how the relevant legislative instruments have been construed in practice over time.

> Maps published by private persons must of course be received with caution. . . . The maps here referred to, even when issued or accepted by departments of the Canadian Government, cannot be treated as admissions binding on that Government; for even if such admission could be effectively made, the departments concerned are not shown to have had any authority to make it. But the fact that throughout a long series of years, and until the present dispute arose, all the maps issued in Canada either supported or were consistent with the claim now put forward by Newfoundland, is of some value as showing the construction put upon the Orders in Council and statutes by persons of authority and by the general public in the Dominion.

This approach is close to that of the International Court of Justice, which distinguished between the production of an official map and subsequent reliance upon or acceptance of it.[3] Production of an official map does not carry with it a warranty of accuracy binding on the government; but

[1] For the use of a meridian of longitude as a boundary and the margins of error in its astronomical determination in the nineteenth century see *State of South Australia* v. *State of Victoria* (1914), A.C. 283.

[2] *Attorney-General for British Honduras* v. *Bristowe*, [1880] I.R. 6 A.C. 143 (adverse possession against the Crown established for sixty years from before 1817).

[3] *Temple of Preah Vihear* case, *I.C.J. Reports*, 1962, p. 21. The map of the area in which the Temple stands 'was invested with an official standing; it had its own inherent technical authority, and its provenance was open and obvious. The Court must nevertheless conclude that, in its inception and at the moment of its production, it had no binding character.'

constant use or acceptance without challenge of such maps by public authorities will preclude a subsequent attempt to dispute their accuracy.

In considering the status of the marginal sea, the Judicial Committee rejected, as already noted, the old doctrine of the 'narrow seas' and has recognized the principle of a contiguous zone beyond territorial limits:

> Whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coast to a distance seaward which exceeds the ordinary limits of its territory.[1]

It has sometimes hesitated to determine the status of the territorial sea, leaving open the question[2]

> whether the shore below low-water mark to within three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective purposes.

But in holding that title to islands emerging in British territorial sea vested in the Crown it said 'There is nothing to recommend a local jurisdiction over a space of water lying above a *res nullius*';[3] though it did not base title to the island expressly upon a principle of appurtenance, or upon proprietary rights in the sea-bed, but upon 'preponderating considerations of practical convenience', for example, that an emergent island should not be open to seizure by the first comer. Further, it has held that the refusal in certain circumstances to return vessels taken in prize to the territorial sea, in which they were taken, would be an infringement of a right of territory.[4]

For the determination of the status of Conception Bay in Newfoundland, there was no rule of international law available at the time providing a definition of a 'bay'; but the Judicial Committee found that

> the British Government has for a long period exercised dominion over this bay, and . . . their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain,

so that title rested upon continuous occupation without adverse claim.[5]

[1] *Croft* v. *Dumphy*, [1933] A.C. 156.

[2] *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1914] A.C. 153, 174–5.

[3] *Secretary of State for India* v. *Sri Raja Chellikani Rama Rao*, [1916] 320 T.L.R. 652, citing *Lord Advocate* v. *Clyde Navigation Trustees*, [1891] e.g. Rettie 174, *per* Lord Kyllachy: 'Is the Crown's right in that strip of sea proprietary, like the Crown right in the foreshore and in the land? Or is it only a protectorate for certain purposes, and particularly navigation and fishing? I am of opinion that the former is the correct view. . . . In each case it is of course a right largely qualified by public uses.'

[4] *The Dusseldorf*, [1920] A.C. 1034: 'Changes in the ownership of the vessel, which is the subject of the proceedings in prize, cannot defeat the claim of territory.'

[5] *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.*, [1877] L.R. 2 A.C. 394.

The bay at its mouth is about twenty miles in width, yielding a semi-circular area under the formula laid down in the Territorial Sea Convention, Article 7, of approximately 157 square miles; since it is forty miles deep its total area must exceed that, so that it is not a 'bay' within the meaning of the Convention, but remains a 'historic' bay.

VI

The principle that agreements between States and native princes or chiefs of peoples, not recognised as members of the community of nations 'are not . . . capable of creating rights and obligations such as may, in international law arise out of treaties',[1] rested on the notion of treaty-making capacity being confined to States. But logically a distinction could be made between, for example, the Indian, Malay or Persian Gulf rulers and many communities in Africa on the basis that the former could be, and sometimes are for certain purposes, recognized as independent States, but the latter have not been[2] and could not be. This broad distinction between protected States and colonial protectorates may be expressed in the statement:[3]

> The stateless society—this is the most obvious difference—has no single central symbol or instrument of rule, is acephalous and segmentary, whereas a single headship is the mark of the presence of the State.

The lines of this distinction were followed[4] by the Permanent Court when it said:

> In spite of common features possessed by protectorates under international law (les protectorats de droit international) they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.

and specifically by the International Court:

> It is not disputed by the French Government that Morocco, even under the Protectorate, has retained its personality as a State in international law. . . . The general terms of Articles V and VI [of the Treaty of Fez (1912)] were broad enough to give to France the conduct of the international relations of Morocco, including the exercise of the treaty-making power.

The International Law Commission has also allowed that treaty-making capacity may be possessed by States members of a federal union.[5]

[1] *Island of Palmas* arbitral award *R.I.A.A.*, 1928, vol. 2, pp. 830, 858.

[2] e.g. immunity from judicial process is denied them and their chiefs: *Chief Tshekedi Kama* v. *Ratshosa*, [1931] A.C. 784.

[3] F. H. Hinsley, *Sovereignty* (1966), p. 7.

[4] *Nationality Decrees in Tunis and Morocco, P.C.I.J.* 1923, Ser. B, No. 4, p. 27; and *Right of U.S. Nationals in Morocco, I.C.J. Reports*, 1952, pp. 185, 193.

[5] e.g. 'States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the Federal Constitution and within the limits there laid down': Article 5 (2), I.L.C., *Report on the Law of Treaties* (1966).

The principle enunciated in the *Island of Palmas* case is then perhaps too extreme. The Judicial Committee has, like courts and authorities in Canada and New Zealand, inclined towards the other extreme. For, putting on one side private concessions, it has in general attributed both the name and function of treaty to all agreements between the Crown, or agents of the Crown, and communities in Africa, Asia and the Pacific islands or the rulers of such communities. The distinction between private and public agreements was made in respect of a concession in Southern Rhodesia:[1]

> The Lippert concession [grant from Chief Lobengula] was not one of those public acts by which one independent sovereign, however humble, enters into political relations with the agents of another. Instruments of that character have been common enough in the history of the British Empire. They derive their juridical character from their recognition and adoption by the Crown, and in interpreting them it is to be borne in mind that they are State documents. The Lippert concession is not of this character. Like the Rudd concession, it received the approval of the High Commissioner on behalf of the Crown, but it is essentially a private contract. . . . Private concessions of large extent and of ambitious character, when obtained by white financiers from untutored aborigines, are generally and justly objects of close scrutiny.

But apart from the long line of decisions, some of which have already been considered, concerning the Indian and Malay states, there is acknowledgement by the Judicial Committee of certain public agreements as treaties, though not without occasional qualifications, in both Canada and New Zealand.

Three decisions on appeals from Canada distribute responsibility between the Dominion and the Province of Ontario for performance of obligations under treaties with the Ojibway Indians.[2] The character and effect of these treaties, as seen in these decisions, may be described in turn.

First, treaties concluded with the Ojibway by or on behalf of the Dominion were in the national, as opposed to Provincial, interest and the Dominion Government were

> on behalf of the Crown, guardians of the Indian interest and empowered to take a surrender of it and to give equivalents in return, but in so doing they were not under special duty to the Province. . . . The duty of the Dominion Government was not that of trustees, but that of ministers exercising their powers and discretion for the public welfare.[3]

However, doubts were obliquely expressed as to whether such a treaty

[1] *In re Southern Rhodesia*, [1919] A.C. 211, 235.

[2] *St. Catherine's Milling and Lumber Co.* v. *The Queen*, [1888] 14 A.C. 46; *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1897] A.C. 199; and *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637.

[3] Ibid., 646.

could be accounted 'a proper international treaty' for the application of the principle of liberal construction,[1] and

> seeing that the substantial question involved in these appeals is that of contract liability for a pecuniary obligation,[2] . . . the rule followed . . . in some really international questions between Canadian Governments ought not to apply here.

Secondly, the treaties did not create any independent interest or special status for the Indians. Here the decisions anticipate the debate in recent Canadian cases as to whether treaty rights can prevail over Federal and provincial legislation. The conclusion is that Federal legislation prevails.[3]

Thirdly, there was surprisingly no insistence that the treaties be incorporated in statute as a condition of their implementation, as was required in a Canadian decision, which rejected the plea of an Indian, charged with the statutory offence of shooting a migratory bird out of season, that an Indian treaty of 1921 gave him the right to take game for food regardless of restrictions.[4] A further contrast may be drawn here with the attitude of the Judicial Committee to the Treaty of Waitangi (1840), discussed above, of which it said:

> It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts, except in so far as they have been incorporated in municipal law

and, in any case, any statute incorporating the treaty provision could be amended or repealed by later statutes.

The difference of approach to statutory incorporation in the New Zealand and Canadian cases is not easy to explain, save perhaps by the facts that in the former the treaty was being directly invoked by its beneficiaries, the Maori owners of lands affected by timber transactions and connected legislation; while in the latter the treaty right of the Indians to payment of annuities was conceded by all parties and not put in issue, the real dispute running on the respective liabilities of the Dominion and the Province for payment of them.[5]

The impact of constitutional law on the implementation of treaties by Commonwealth countries has been considered in a number of cases by the Judicial Committee.

[1] *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1899] A.C. 211.

[2] To pay to the Ojibway Indians certain annuities, to be increased in certain circumstances, in consideration of surrender of lands.

[3] See *R.* v. *George*, [1966] 55 D.L.R. 2d 386, Canada, Supreme Court. Provincial legislation is however limited by the statutory provision that the applicability of general laws to Indians is 'subject to the terms of any treaty', under Indian Act s. 87: *R.* v. *White and Bob*, [1965] 52 W.W.R. 193, Canada.

[4] *R.* v. *Sikyea*, [1965] 50 D.L.R. 2d 80, Canada, Supreme Court.

[5] The question whether the Crown can, without legislation, compel its subjects to comply with the provisions of a peace treaty or of 'a treaty having as its object the preservation of peace' was left open in *Walker* v. *Baird*, [1892] A.C. 491.

Articles of Agreement for a Treaty between Great Britain and Ireland were signed by British and Irish delegates on 6 December 1921. It was scheduled to and made part of the Irish Free State (Constitution) Act 1922, but it was a matter of a continuing dispute between the two countries whether the Articles of Agreement were an international agreement at all, for the purpose, for example, of registration under Article 18 of the League Covenant; whether or not they and the Act of 1922, in which they were incorporated, were the foundation of the Irish Free State and its constitution;[1] and whether they were, as a treaty, an independent source of obligations for the Irish Free State.[2]

In November 1933 certain persons, whose claim to ownership of a fishery in the tidal waters of the River Erne had been denied by the Supreme Court of the Irish Free State, obtained leave to appeal to the Privy Council. A few days later the Constitution (Amendment No. 22) Act 1933 was passed by the *Oireachtas*, the Parliament of the Irish Free State, abolishing appeals from any court of the Free State to the Privy Council, including appeals then pending. The Judicial Committee,[3] proceeding on the basis that the Irish Free State (Constitution Act) 1922, was the source of all constitutional authority in the Free State, held that Statute of Westminster s. 2 nevertheless enabled the *Oireachtas* to amend or repeal any of the provisions of that Act, and that the Constitution (Amendment No. 22) Act 1933 was *intra vires*. But it refrained from expressing any opinion

> upon any contractual obligation under which, regard being had to the terms of the Treaty, the Irish Free State lay. The simplest way of stating the situation is to say that the Statute of Westminster gave to the Irish Free State a power under which they could abrogate the Treaty, and that as a matter of law they have availed themselves of that power.

But the abrogation as a matter of law is here to be understood as confined to the modification of the Articles of Agreement as incorporated in domestic law. The question whether a treaty, establishing constitutional relations between two countries, can be regarded as terminated upon its incorporation into domestic law remains an open question.

Three decisions on the implementation of international conventions in Canada,[4] of which the last was perhaps the most controversial, exposed

[1] e.g. *Attorney-General* v. *Southern and Western Railway Co. of Ireland*, [1925] A.C. 754, House of Lords: 'The effect of that Agreement and of the Act of Parliament which gave it the force of law, was to set up in Southern Ireland a new State or Dominion.'

[2] For a fuller account see J. E. S. Fawcett, *British Commonwealth in International Law* (1963), pp. 154–7.

[3] *Moore* v. *Attorney-General for the Irish Free State*, [1935] A.C. 484.

[4] *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54; *In re the Regulation and Control of Radiocommunication in Canada*, [1932] A.C. 304; and *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 326 (I.L.O. Conventions).

a legislative failure to modernize the procedure for making and implementing treaties[1] and adapt it to the constitutional evolution of Canada; for:

> This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis à vis the mother country Great Britain . . .[2]

However, the Judicial Committee refused to treat s. 132 as conferring a general treaty-making power, and construed it strictly in two of the cases and with perhaps deliberate imprecision in the third. In both the *Radio Communication* case and the *Labour Conventions* case it was held that neither the International Telegraph Convention 1927, nor the I.L.O. Industrial Undertakings, Minimum Wages, and Limitation of Hours Conventions, were 'treaties between the Empire and foreign countries', for as was said in the *Labour Conventions* case:

> The obligations are not obligations of Canada as part of the British Empire, but of Canada by virtue of her new status as an international person . . .

In the *Aeronautics* case the Judicial Committee was able to find that the Paris Convention 1919 was such a treaty, though a closer examination of the record of the conclusion and subsequent amendments of the Convention would have shown that it was impossible to regard the 'British Empire' as a contracting party to it.[3]

The result was that, save in the *Aeronautics* case, the Judicial Committee was compelled to find authority for Canada to implement treaties, to which it was a party, not in s. 132 but either in a residual power as in the *Radio Communication* case, or in distribution of powers between Dominion and Provinces under British North America Act 1867, ss. 91, 92, as in the *Labour Conventions* case. It is plain that s. 132 is now to all intents and purposes obsolete.

The last case contained a statement of British treaty practice, to the effect that:

> The making of a treaty, by which is meant 'any agreement between two or more sovereign States', is an executive act, while its implementation, if it entails changes in domestic law, requires legislative action;
>
> An expression of sanction or approval by Parliament of a draft treaty before ratification by the Crown does not itself operate as ratification, and does not preclude the refusal of Parliament of subsequent legislative proposals for giving effect to provisions of the treaty.

The Judicial Committee has given useful guidance on the interpretation

[1] British North America Act 1867, s. 132: 'The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.'

[2] *Radio Communication* case, [1932] A.C. 304.

[3] See Fawcett, op. cit., pp. 21–2.

of treaties, which may be drawn from a number of cases, and summarized as follows:

An international agreement is 'expressed in what is by tradition the common language of international intercourse' so that 'neither municipal law nor the technical terms of the negotiating countries can be expected to find a place' . . .[1]

'Exactitute of literary idiom' must not be looked for[2] and the versions of treaty provisions in the different languages in which they have been drafted must be compared;[3]

Allowance must be made for the compromise of conflicting interests in international agreements,[4] so that

(i) a liberal interpretation must be sought;[5] and

(ii) the principle of effectiveness makes it 'unreasonable to expect a greater precision than the circumstances admit of, or to reject as incomplete provisions which are expressed without much detail and sometimes only in outline';[6]

(iii) The preamble is material as indicative of the purposes of the treaty, but is subordinate to the main text[7]

As treaty rules have of necessity international currency, 'it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation'.[8]

Breaches of an international convention by a contracting party may entitle another contracting party to hold itself no longer bound by the obligations of the convention towards the party in breach, but if it continues to observe the provisions of the convention it will have waived its right to terminate.[9] Further, where a convention makes no provision for action in case of its non-observance, a prize court cannot 'constitute itself the guardian of the convention and invent and exact penalties for its non-observance'.[10]

[1] *The Blonde*, [1922] 1 A.C. 313; *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*, [1959] 2 A.E.R. 740, 744.

[2] *The Blonde*, [1922] 1 A.C. 133.

[3] *Kossekechatko* v. *Attorney-General for Trinidad*, [1932] A.C. 78; and evidence (if necessary) of the meaning of terms in a foreign language: *Assicurazioni Generale* v. *Cotran*, [1932] A.C. 268.

[4] *The Blonde*, [1922] 1 A.C. 313; *The Rannveig*, [1922] 1 A.C. 97: 'the agreement as a whole has compromise writ large upon the face of it'.

[5] *The Blonde*, [1922] 1 A.C. 313; *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1897] A.C. 199, 211.

[6] *The Blonde*, [1922] 1 A.C. 313.

[7] *H.M. Procurator-General in Egypt* v. *Deutsches Kohlen-Depot Ges.*, [1919] A.C. 291, 301.

[8] *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*, [1959] 2 A.E.R. 739, 744.

[9] *The Blonde*, [1922] 1 A.C. 313: '. . . repudiation by Germany [by conduct of Hague Convention VI—1907] could do no more than give to this country the right to accept that repudiation and to treat the Convention as no longer binding. There is no evidence that this was ever done.'

[10] *H.M. Procurator-General in Egypt* v. *Deutsches Kohlen-Depot Ges.*, [1919] A.C. 291, 299; and *The Südmark*, [1917] A.C. 620, both concerned with the Suez Canal Convention, 1888.

VII

The Judicial Committee has had little occasion to consider international organizations, but it has in two cases touched on their powers.

The Treaty of Paris 1856, Article XVI, established a temporary Commission for the Danube, composed of representatives of Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey. The Commission was to execute river works on the lower Danube below Isatcha, to clear the Danube and to fix duties to finance navigational improvements. Article XVII established a permanent Commission to regulate navigation and police the river to remove impediments and to execute river works. The temporary Commission issued 'Provisional Regulations for the Navigation of the lower Danube', and it was alleged that this was binding on The *Smyrna*, a vessel involved in a collision. On an appeal from the Consular Court at Galatz,[1] the Judicial Committee observed that it was impossible to bring the issue of the provisional regulations within the scope of the functions directly assigned to the Commission. It then enunciated certain propositions of a general import, which may be summarized as follows:

> To make good any claim that the provisional regulations were issued under implied powers of the Commission, it would have to be shown that they served to facilitate or protect works in progress, which the Commission was authorised to execute;
>
> A representative on the Commission could not, by assent to the issue of regulations which were *ultra vires* the Commission, bind the State of which he was representative;
>
> Turkey could not, as riverain State in the stretch of the river concerned, validate the regulations by subsequent ratification of the assent of her representative;
>
> The regulations, though initially *ultra vires*, might become binding by consistent observance over time.

The Judicial Committee found the creation of the Government of Palestine under the Mandate 'somewhat anomalous',[2] and withheld decision as to whether the question of the compatibility of the Immigration Ordinance 1941, as amended, with the provisions of the Mandate was justiciable. However, in concluding that the forfeiture of vessels engaged in the transport of unlawful immigrants into Palestine had not been shown to be contrary to 'any established principle of international law', it added that 'a penalty so expedient, if not essential, for the prevention of an unlawful invasion of its territory' might in any event be imposed by the Mandatory; for an exception might have to be made

> in the case of a Mandatory enforcing by action, which seems to it essential, the policy which the Principal Allied Powers entrusted to its charge.

This notion of a public interest, that States may by agreement on a legitimate common policy authorize one or more of their number to execute it

[1] *The Smyrna*, [1864] 2 Moore N.S. 435.
[2] *Naim Molvan* v. *Attorney-General for Palestine*, [1948] A.C. 351.

by means that exceptionally infringe individual rights, may be said to underlie Chapter VII and particularly Article 41 of the Charter.

VIII

Review of Judicial Committee decisions in prize, save in so far as they touched on points of general international law, would have led too far afield, but we may end by noticing four decisions, one not in prize, bearing on states of hostilities and war.

The Judicial Committee has firmly asserted that military occupation of foreign territory does not alter either its legal status or the system of law, which is established and is to be observed within it. So, on a question of beneficial ownership of certain land in Singapore, it was said:[1]

> . . . The proper law to apply to the question of title is the same as it was before the Japanese occupation, inasmuch as military occupation, and even annexation, does not in itself change the law in the area occupied.

and

> the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies.[2]

It follows that:

> The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful sovereign, wrongs done during the foreign occupation are cognizable by the ordinary courts.[3]

The unconditional surrender of the German armed forces, and the subsequent assumption of all governmental authority by the Four Powers in Germany, were sufficiently without precedent to call for caution in the application to them of rules of law. The Judicial Committee observed,[4] however, that unconditional surrender does not of itself terminate the exercise of belligerent rights, in particular the right of seizure of vessels, by other powers in at least two circumstances: where the surrender is confined to the armed forces and is not an act of the government, so that it is not analogous to a general armistice; and where a war has been carried on by two or more countries as allies and, despite the surrender, active hostilities are continued by an ally, in the particular circumstances, Japan.

[1] *Sultan of Johore* v. *Abubakar Tunku*, [1952] A.C. 318, 342.
[2] *The Gerasimo*, [1857] 11 Moore P.C. 88.
[3] *De Jager* v. *Attorney-General for Natal*, [1907] A.C. 326.
[4] *Schiffahrt-Treuhand GmbH* v. *H.M. Procurator-General*, [1953] 1 A.E.R. 364.

NOTES

PROOF OF FOREIGN LAW: SCRUTINY OF ITS CONSTITUTIONALITY AND VALIDITY*

By K. LIPSTEIN, PH.D.

Reader in Conflict of Laws, University of Cambridge

1. It is a commonplace that the conflict of laws is concerned with the question whether local or foreign law applies, and that local courts cannot command extensive knowledge of foreign law. The content of the relevant foreign law must be ascertained in each case, but the process of ascertainment is not uniform. In some countries the courts alone assume this task *ex officio*; in others the courts and the parties co-operate in this endeavour; in common law countries the burden of proving foreign law falls exclusively upon the parties. The difficulties which face the courts and the parties when seeking to ascertain and to prove foreign law are well known, but a special problem which may arise in the course of this process has attracted little attention, especially in Anglo-American law. It has its basis in the hierarchical structure of rules in certain legal systems. According to English law and according to a number of other legal systems a rule, once established, cannot be challenged as to its validity. According to other legal systems, such as those of the United States, Canada, Germany and Italy, the process of ascertaining the rule applicable in a particular case may present two separate questions which must be examined consecutively. The first concerns the content of the rule which applies in the circumstances. The second is whether the rule so ascertained is valid or invalid according to the overriding principles of the foreign constitution within the framework of which the relevant rule of foreign law operates.

Thus, for example, in a case involving matrimonial property relations it may be found that Ruritanian law applies. The relevant rule of Ruritanian law is clear. Yet one of the parties may argue that it violates the principle of the equality of the sexes, as laid down by the constitution of the foreign country the law of which is applicable and has been proved, and that the rule itself is accordingly invalid. In these circumstances the question arises whether the courts of the country where the action is brought may take it upon themselves to pass upon the validity of the rule of foreign law in the light of foreign constitutional law. On a lower level, the same problem is posed, if the rule of foreign law is to be found in delegated legislation (*décret*, *Verordnung*), and it is contended that such legislation contravenes an Enabling Act of the *lex causae*. Again, it may be contended that a treaty made between the State of the *forum* and the State of the *lex causae*, or between the latter and a third State, has not been incorporated into the law of the State the law of which is applicable, although the Constitution of that State so requires if the treaty is to be effective. Conversely, it may be argued that, according to the constitutional law of the foreign *lex causae*, a previous treaty has been superseded by subsequent domestic legislation. Finally, in its most rarefied form, the same question may present itself in two stages, if it is contended that the applicable rule of foreign law violates a precept of public international law and that the constitution of the foreign State concerned invalidates all provisions

* © Dr. K. Lipstein, 1968.

of its domestic law which are contrary to principles of public international law accepted by that State.[1]

2. In all these circumstances the court of the *forum* is faced with the problem whether it may itself scrutinize the material validity or constitutionality of the rule of foreign law before it can proceed to apply that rule to the case for determination. This problem has been noticed, in passing, in the older[2] and, in greater detail, in the more modern literature.[3] In general, writers are in favour of admitting such a scrutiny. The argument, drawn from considerations relying on a particular theory of constitutional law, that in carrying out such a scrutiny, a court of the *forum* would be usurping the powers of a foreign legislature[4] cannot claim universal validity.[5] It proceeds from the characterization, adopted in the domestic law of France, England and some other countries, to the effect that the control of the constitutionality of laws is a political and not a judicial activity. However, this characterization is by no means universal, and in the matter of proof of foreign law, the scrutiny of the validity of that law and its compatibility with higher rules of that legal system must be regarded as part of the judicial process, if the foreign law concerned enjoins the courts to undertake this examination before applying the law concerned. However, the circumstances and conditions in which courts in other countries may engage in this examination are not entirely clear. Three situations must be distinguished for this purpose.

First, if the foreign law reserves for a special court[6] the determination, with binding effect *erga omnes*, whether a particular rule violates the constitution and is invalid, the court of the *forum* is precluded from assuming this function.[7] The reason is clear:

[1] See, e.g., the Constitutions of the German Federal Republic, Art. 100; of Italy, Arts. 134, 136; of Austria, Arts. 89, 140.

[2] Zitelmann, *Internationales Privatrecht* (1897), 1, p. 286; Kunz, *Niemeyer's Zeitschrift* 32 (1924), p. 26; Niboyet, *Revue de droit international et de législation comparée* (1928), p. 764; Melchior, *Die Grundlagen des deutschen internationalen Privatrechts* (1932), pp. 86–7, No. 59; Neumeyer, *Internationales Verwaltungsrecht* (1936), vol. 4, pp. 221–2, 226–8; Maury, *Recueil des cours*, 57 (1936–III), p. 394, No. 66 and the authors cited by De Nova, *Foro padano*, 1955, IV, p. 2, n. 2.

[3] Nussbaum, *Principles of Private International Law* (1943), p. 258; *Grundzüge des internationalen Privatrechts* (1952), p. 245; Mann, *Law Quarterly Review*, 59 (1943), pp. 42, 44, 159; Niboyet, *Traité de droit international privé français* (1944), vol. 3, p. 403, Nos. 978–82; Wolff, *Private International Law* (2nd ed., 1950), p. 214, No. 205; *Das internationale Privatrecht Deutschlands* (3rd ed., 1954), p. 87; Lipstein, *Transactions of the Grotius Society*, 35 (1950), pp. 157, 159; Morgenstern, *International Law Quarterly*, 4 (1950), pp. 326, 330, De Nova, loc. cit., p. 1; Niederer, *Einführung in die allgemeinen Lehren des internationalen Privatrechts* (2nd ed., 1956), p. 342; Batiffol, *Traité élémentaire de droit international privé* (4th ed., 1967), p. 379, No. 331; Morelli, *Studi Perassi* (1957), vol. 2, pp. 169–83, repr. *Rivista italiana per le scienze giuridiche*, 3rd ser., 7 (1954), pp. 27–38; Neumayer, *Rabel's Zeitschrift*, 23 (1958), pp. 573–98; Quadri, *Diritto internazionale*, 13 (1959), pp. 31–5; Mosconi, ibid., 14 (1960), pp. 426–39; Neuhaus, *Grundbegriffe des internationalen Privatrechts* (1962), p. 231; Ferid, *Vom deutschen zum europäischen Recht* (1963), vol. 2, pp. 119, 145–6; Tommasi di Vignano, *Lex fori e diritto straniero* (1964), pp. 109–21; C. David, *La Loi étrangère devant le juge du fond* (1965), p. 254; Carbone, *Rivista di diritto internazionale privato e processuale*, 1 (1965), p. 685; Dicey and Morris, *Conflict of Laws* (8th ed., 1967), p. 1116.

[4] Batiffol, op. cit.; Quadri, loc. cit, p. 34; De Nova, op. cit., p. 5 (all cited in the preceding note); and Nussbaum, *Yale Law Journal*, 56 (1941), pp. 1019, 1031.

[5] De Nova, op. cit., p. 10, n. 20; Neumayer, loc. cit., p. 590, n. 63; Tommasi di Vignano, op. cit., pp. 115–16 (all above, p. 266, n. 3).

[6] As, for instance, the Constitutions of the German Federal Republic, Art. 100 and of Italy, Art. 134, provide. Nevertheless, German law attributes legislative functions to the decisions of the Constitutional Court, at least in certain circumstances; see *Gesetz über das Bundesverfassungsgericht* of 12 March 1951, para. 3112, BGBl., 1951, I, p. 243. For Italy, see Art. 136 of the Constitution.

[7] Carbone, loc. cit. (note 3 on this page), p. 689.

until the foreign court charged with the special function of determining the constitutional validity of the rule in issue has determined the rule to be unconstitutional, it remains valid in the foreign country concerned.[1] After the special foreign court has spoken, the law has either been confirmed or has ceased to operate.[2]

Secondly, if the right of scrutiny is excluded altogether by the foreign law concerned,[3] courts in other countries equally cannot question the validity of the foreign legislation.

Thirdly, if the foreign legal system grants the right of scrutiny to all its courts,[4] courts in other countries may also exercise this right.

3. The last-mentioned principle has given rise to some doubt and speculation. It has been suggested[5] that if the highest court of the foreign country has pronounced on the question, the situation is the same as if it had been decided by a special court, but that in all other circumstances the courts of the *forum* are free to act, albeit with the utmost caution.[6] They should only disallow a rule of foreign law on the ground that it violates a principle of foreign constitutional law, if a considerable body of precedent to this effect has accumulated in the foreign country concerned. Alternatively, it has been urged that no distinction should be made according to whether the question has been reserved for or has been decided by a special constitutional court or by a Supreme Court abroad. Instead, it is argued, the nature of the foreign judgment is determining. If it purports to have effect *erga omnes*, courts in other countries must follow it; they remain free, however, to decide the question themselves, if the foreign judgment operates *inter partes* only[7] or does not bind the courts below.[8] Closely akin is the view,[9] reflecting the Italian approach to constitutional review,[10] that the courts of the *forum* can proceed to examine the constitutional validity of foreign law, if according to the foreign law concerned the decision finding the foreign rule to be in violation of the foreign constitution is declaratory as to the nullity of the law; but cannot do so, if it is constitutive and so annuls the law from the date of the decision or later.[11]

4. None of these suggestions meets squarely the point for consideration here, which is whether the courts of the *forum* can examine the constitutionality of foreign law applicable in the circumstances. Clearly, the courts of the *forum* are unlikely to act, if a foreign court of final resort has decided the issue of foreign law, irrespective of whether this was a special constitutional court for which the determination of such questions is reserved by the foreign law concerned in order to ensure uniformity, or the Supreme Court, no matter whether its decisions are binding in other cases. In such circumstances the constitutional validity or invalidity is hardly open for discussion. The question for examination here is whether the courts of the *forum* can act in the absence of a determination of the issue in the foreign country.

[1] Cf. the literature cited by Carbone, ibid., n. 14; Tommasi di Vignano, op. cit. (above, p. 266, n. 3), p. 118.

[2] De Nova, op. cit., pp. 3, 6; Carbone, loc. cit., p. 687 and n. 6 with literature there cited (both above, p. 266, n. 3).

[3] As, for instance, in France, Switzerland and in England.

[4] As, for instance, in the United States.

[5] De Nova, op. cit., p. 2, No. 2; Neumayer, loc. cit., p. 592 (both above, p. 266, n. 3).

[6] De Nova, op. cit., p. 8; Niederer, op. cit., p. 342; Carbone, loc. cit., pp. 687–8, 692 (all above, p. 266, n. 3).

[7] De Nova, *Revue critique de droit international privé* (1958), pp. 519, 536; but see Carbone, loc. cit. (above, p. 266, n. 3), p. 693.

[8] Neumayer, loc. cit. (above, p. 266, n. 3), p. 592.

[9] Quadri, loc. cit. (above, p. 266, n. 3), p. 33.

[10] Morelli, op. cit., pp. 174–9 and Carbone, loc. cit., p. 688 and n. 10 with literature (both above, p. 266, n. 3); see also Lepaulle, *Le Droit international privé* (1948), p. 197.

[11] See, e.g., Art. 136 of the Italian Constitution.

Referring back to the three principles already mentioned, the position may now be summarized as follows. The various views set out above appear to confirm the first and third principles to the effect that the courts of the *forum* cannot scrutinize the constitutional validity of foreign law, if the matter is reserved by foreign law for determination by a special court in order to preserve uniformity; but can do so if the foreign law permits such a scrutiny. Nevertheless, they will not do so, if a firm practice or a court of last resort in the foreign country has determined the issue—in short, when the question of foreign law is clear. The second principle seems to be undisputed.

5. It may be objected that these principles may operate so as to deprive a party of a remedy in the court of the *forum*, because that party may not be able to plead that the rule of foreign law applicable *in casu* is unconstitutional, if the foreign law reserves this matter for the consideration of a special court. Yet, if the same case had arisen in the courts of the *lex causae*, such a review would have been admissible. In reply, it may be urged that the reservation of the question of constitutionality for a special court is not merely a division of jurisdiction but a means of safeguarding certainty and uniformity in the last resort. In the meantime the law retains its validity throughout. The difficulty could be resolved if the courts of the *forum* were empowered to refer such questions to a court of the *lex causea* for determination.[1]

6. In practice, the problem has presented itself on a limited number of occasions. In *Anglo-Iranian Oil Co.* v. *SUPOR* the *Tribunale* of Rome considered whether the Iranian legislation expropriating the plaintiff offended against the Iranian Constitution and found that it did not.[2] In England, a Divisional Court of the King's Bench Division in *Re Amand*,[3] before applying a decree by the Dutch Government in exile, examined the issuc of its validity under Dutch constitutional law. Similarly, in *King of the Hellenes* v. *Bostrom*,[4] and in *A/S Talinna Laevauhisus* v. *Estonian State S.S.Line*[5] evidence was heard as to whether a Greek and an Estonian decree respectively were unconstitutional.[6] And in *Estonian Cargo and Passenger S.S. Line* v. *S.S. Elise and Messrs. Laane and Baltser*, the Canadian Exchequer Court said: 'It appears from the authorities that the court has a right and duty, even where the foreign legislative Act was enacted by a State duly recognized, to examine its constitutional validity.'[7] The same course was taken by the American Supreme Court in *Shapleigh* v. *Mier*,[8] The Court of First Instance of Vienna, in a decision of 1 March 1934[9] in an action against the Austrian Government based upon a loan floated in the United States and payable in gold coin, refused to consider whether the Joint Resolution of Congress of 5 June 1933

[1] See Morelli, op. cit., pp. 179 et seq., and Neumayer, loc. cit., p. 596 (both above, p. 266, n. 3).

[2] *Giurisprudenza italiana*, 1955, I, 2, p. 19; *Foro italiano*, 1 (1955), p. 256; *Foro padano*, 1954, I, p. 1053; *Rivista di diritto internazionale*, 38 (1955), p. 97; *Revue critique de droit international privé* (1958), p. 519; *International and Comparative Law Quarterly*, 5 (1956), p. 607; *American Journal of International Law*, 49 (1955), p. 259; I.L.R. (1955), p. 19. The court of Rome also examined the question whether the foreign law violated the Italian Constitution and was contrary to Italian public policy; see below, p. 269, n. 2.

[3] [1941] 2 K.B. 239, 253; [1942] 1 K.B. 445, 449, 452.

[4] (1923) 18 LL.L.R., 168, 190, 192 (C.A.). The question was disposed of on the ground that the constitution was no longer observed *de facto*; see also p. 23, ibid.

[5] (1947) 80 LL.L.R., 99, 114; see also 112, 113.

[6] The view to the contrary expressed by Morris, *Law Quarterly Review*, 68 (1952), pp. 125, 127 seems to be unfounded.

[7] [1948] Exch. C.R. 435, 446, 451; [1948] 4 D.L.R. 247, 259, 264 reversed on other grounds [1949] S.C.R. 530; [1949] 2 D.L.R. 641.

[8] 299 U.S. 468, 473 (1937).

[9] *Die Rechtsprechung* (1934), p. 82, cited by Nussbaum, *Yale Law Journal*, 50 (1941), pp. 1018, 1031; *Clunet* (1935), pp. 193–4.

abrogating gold coin clauses was valid. The Austrian Supreme Court stated: 'The pronouncement of a foreign Supreme Court called upon by the Constitution to examine the validity of foreign legislation must also be respected by a court of the forum.'[1]

7. Finally, it must be noted that the problem discussed here differs from a number of others which, superficially, show the same features. These are:

First, whether a rule of foreign law, which is applicable according to the rules of private international law of the *forum*, runs counter to a fundamental principle of the *lex fori*, as embodied in the constitution of the latter and cannot, therefore, be applied in the individual case before the court of the *forum* on the ground that it violates the constitution or is against public policy.[2]

Secondly, whether a choice of law rule of the *forum* is itself compatible with the constitution of the *forum*. This problem is of paramount importance in the United States,[3] and has attracted much attention in Germany.[4]

Thirdly, whether the executive acts of a foreign government within its own territory can be examined as to their legality or validity according to the law of that State for the limited purpose of establishing that they give rise to an action in tort in the courts of the *forum* against an individual who derived rights from that government or acted on its behalf.[5] Here it suffices that the government has been recognized, and it is irrelevant whether the act violates the constitution of the foreign country concerned or not. In all other circumstances, where foreign law is applicable, the fact that the government which promoted the legislation has been recognized, does not render

[1] *Clunet* (1936), pp. 717, 723; Domke, ibid., pp. 547, 556.

[2] Gamillscheg, *Festschrift für Nipperdey* (1965), vol. 1, p. 323; *Gesetz über das Bundesverfassungsgericht* of 12 March 1951 (BGBl., 1951, I, p. 243, para. 13 (6), (11), (12); decisions of the Federal Constitutional Court, ibid., 1951, 1, p. 11; 1957, 4, pp. 291, 295; *Studi Perassi*, vol. 2, pp. 180–6; Mosconi, loc. cit. (above, p. 266, n. 3), pp. 429, 435 to the effect that a provision such as Art. 10 of the Italian Constitution incorporating the supremacy of international law must be confined to the operation of Italian legislation. The problem has sometimes been put in the form of a question whether a rule of foreign law violates public international law and therefore offends against the public policy of the *forum*. See, e.g., *The Rosemary*, [1953] 1 W.L.R. 246; I.L.R. (1953), p. 312; *Clunet* (1956), p. 113; *Re Helbert Wagg*, [1956] Ch. 323; *The Miriella, Giurisprudenza italiana* (1953), vol. 1, pp. 2, 305; *Foro italiano* (1953), vol. 1, p. 719; *Rivista di diritto internazionale*, 36 (1953), p. 217; *International and Comparative Law Quarterly*, 2 (1953), p. 628; *Svit Impresa Nazionale* v. *Cipera, Rivista di diritto internazionale*, 40 (1957), p. 264; *Anglo-Iranian Oil Co.* v. *Idemitsu Kosan Co., Japanese Annual of International Law* (1957), p. 55; *Senembah Maatschappij N.V.* v. *Bank of Indonesia et al., Nederlands Juristenblad* (1959), p. 73; (1963), I.L.R., vol. 26, p. 38; *Nederlands Juristenblad* (1959), p. 350; (1966), I.L.R., vol. 30, p. 28; *N.V. Vereenigde Deli Maatschappijen N.V. Senembah Mij.* v. *Deutsch-Indonesische Tabak Ges., Archiv des Völkerrechts*, 9 (1961), p. 318; *Jahrbuch für internationales Recht*, 9 (1960), p. 84.

[3] See *Home Ins. Co.* v. *Dick*, 281 U.S. 397 (1930), Ehrenzweig, *Private International Law* (1967), s.7, pp. 34–5 and s. 118, p. 194; *Conflict of Laws* (1962), p. 362.

[4] Dölle in *Festgabe für Erich Kaufmann* (1950), p. 19, at pp. 39–46; *Revue internationale de droit comparé*, 2 (1950), p. 250 at pp. 268–75; Makarov, in *Rabel's Zeitschrift* 17 (1952), p. 382; Neuhaus, ibid., 20 (1955), p. 52; Siegrist, ibid., 24 (1959), p. 54 and the literature cited by Gamillscheg in *Festschrift für Nipperdey*, (1965), vol. 1, p. 323, n. 2; *Bayerischer Verfassungsgerichtshof* of 13 May 1956; *Deutsche Rechtsprechung* (1956–7), No. 124; Leisner, *Bayerisches Verwaltungsblatt* (1957), p. 108.

[5] This problem is known in common law countries as the question of the 'Act of State'. See, e.g., Hyde, *American Journal of International Law*, 53 (1959), pp. 635–8; Zander, ibid., pp. 826–52; Reeves, ibid., 54 (1960), p. 141; note in *Columbia Law Review*, 62 (1962), pp. 1278–1312; Zander, *Modern Law Review*, 27 (1964), pp. 588–93; Falk, *American Journal of International Law*, 58 (1964), pp. 935–51; Wright, ibid., pp. 304–15; Simmonds, *International and Comparative Law Quarterly*, 14 (1965), pp. 452–92; Friedmann, *Columbia Journal of Transnational Law*, 3 (1965), pp. 103–7; Collinson, ibid., pp. 27–55; Cf. *Regno di Grecia* v. *Gamet et al., Foro italiano* 1957, I, pp. 1964, 1967. *Re Amand*, [1941] 2 K.B. 239, 253; cf. [1942] 1 K.B. 445, 449.

that legislation valid, if it is unconstitutional. Before the legislation can be valid the foreign government must change the constitution, if necessary with retroactive effect.

Finally, the problem does not arise if the parties in their transactions, or one party alone in a unilateral act, such as a will, incorporate certain provisions of foreign law in the instrument. In these circumstances, foreign law, whether valid or invalid, has become a term of the contract or disposition.[1]

[1] Morelli, op. cit. (above, p. 266, n. 3), pp. 169, 171. For the problem of incorporation of foreign law in general, see Dicey and Morris, *Conflict of Laws* (8th ed., 1967), pp. 701–3.

CRIMES COMMITTED ON BOARD AIRCRAFT: TOKYO CONVENTION ACT 1967*

By ALEC SAMUELS

Lecturer in Law, University of Southampton

1. *Jurisdiction over crimes on board aircraft*

The problem of jurisdiction over crimes committed on board aircraft[1] has been a serious one for some time, especially in view of the enormously expanding volume of air traffic in the modern world. The International Law Association (I.L.A.) has carried out extensive work on the problem since the 1920s. Some years ago the Legal Committee of the International Civil Aviation Organization (I.C.A.O.), a specialized agency of the United Nations, started a study of the powers of the aircraft commander and this led to a full-scale inquiry into the whole problem, culminating in the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo in 1963.[2] Lord Wilberforce, who led the British delegation, has played a conspicuous part in the work. Sixty-one States were represented at Tokyo, sixteen signed originally, a total of twenty-eight have now signed, and six States have ratified, i.e. Denmark, Nationalist China, Norway, The Philippines, Portugal and Sweden. The Convention will come into operation ninety days after the twelfth ratification.[3]

* © Alec Samuels, 1968.

[1] For debates in Parliament see *Hansard*, H.C., vol. 738, cols. 884–97, 16 December 1966; standing committee C, ibid., vol. 748, col. 100, 14 June 1967; third reading, ibid., 16 June 1967; second reading in the House of Lords (introduced by Lord Wilberforce), ibid., H.L., vol. 284, cols. 113–23, 27 June 1967; committee, ibid., cols. 509–14, 4 July 1967; third reading, ibid., cols. 1278–83, 13 July 1967. Royal Assent, 14 July, 1967. Commencement on day or days to be appointed (s. 9 (3)). The Tokyo Convention Act 1967, together with the Civil Aviation Acts 1949 and 1960 and the Civil Aviation (Eurocontrol) Act 1962 may be cited as the Civil Aviation Acts 1949 to 1967. Geneva Convention on the High Seas 1958, Cmnd. 584. Convention on Offences and certain other Acts committed on Board Aircraft, Tokyo, 14 September, 1963, I.C.A.O. Doc. No. 8364 (1963), Cmnd. 2261; also printed in *American Journal of International Law*, 58 (1964), pp. 566–73. Resolution concerning Conflicts of Laws in the Law of the Air, 11 September 1963, *Institut de Droit international* (Brussels, 1963), also in *American Journal of International Law*, 58, (1964), pp. 114–15, 120–2, D. H. N. Johnson, *Rights in Air Space*, pp. 74–9 (Convention printed on pp. 80–7). *Shawcross and Beaumont on Air Law* (3rd ed., P. B. Keenan, A. Lester and P. Martin, 1966), pp. 701–15—an excellent study. A. Lester, 'Crimes on Aircraft', *New Law Journal*, 117 (1967), p. 497. For an account of the old law exemplified in a novel, see Donald Fish, *Airline Deadline*. For a discussion of the pre-Tokyo law, cases and bibliography see O'Connell, *International Law*, vol. 1, pp. 586–8. See further: Lord McNair, *The Law of the Air* (3rd ed., M. R. E. Kerr and A. H. M. Evans, 1964), Tokyo Convention printed on pp. 535–42; Wilberforce J., 'Crime in Aircraft', *Journal of the Royal Aeronautical Society*, 67 (1963), p. 175; Boyle and Pulsifer, 'The Toyko Convention', *Journal of Air Law and Commerce*, 30 (1964), pp. 305–54; Gutierrez, 'Should the Tokyo Convention be Ratified?', ibid., 31 (1965), pp. 1–21; G. F. Fitzgerald, 'Offences and certain other Acts Committed on Board Aircraft: the Tokyo Convention of 1963', *Canadian Yearbook of International Law*, 2 (1964), pp. 191–204, and by the same author 'The Development of International Rules Concerning Offences . . . on Board Aircraft', ibid., 1 (1963), pp. 230–57—two most informative articles from a Senior Legal Officer of the I.C.A.O.; Dr. Bin Cheng, 'Crimes on Board Aircraft', *Current Legal Problems*, 12 (1959), p. 177. Alex Meyer, *Internationale Luftfahrtabkommen*, Köln, 1964. Fenston and De Saussure, 'Conflict in the competence and jurisdiction of courts of different States to deal with crimes committed on board aircraft', 1 (1952) *M'Gill Law Journal*, 66.

[2] Boyle and Pulsifer, 'The Tokyo Convention 1963', *Journal of Air Law and Commerce*, 30 (1964), pp. 305, 316.

[3] Article 21.

It is hoped and expected that the United Kingdom will ratify soon. Each contracting State is required to take such measures as may be neccssary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.[1]

The Tokyo Convention Act 1967, following the example of Australia and Canada, makes the necessary changes in English municipal law in order to enable the United Kingdom to ratify the Convention. The Act seeks to clarify the legal position regarding crimes committed on aircraft, including acts likely to jeopardize the safety of an aircraft or the persons or property on board or good order and discipline; secondly, it deals with the position of the commander and crew of an aircraft; thirdly, it deals with what is to be done when the aircraft lands with a person on board who has committed an offence. English criminal law is applied to aircraft as follows:[2]

> Any act or omission taking place on board a British-controlled aircraft while in flight elsewhere than in or over the United Kingdom which, if taking place in, or in a part of, the United Kingdom, would constitute an offence under the law in force in, or in that part of, the United Kingdom shall constitute that offence;
>
> Provided that this subsection shall not apply to any act or omission which is expressly or impliedly authorised by or under that law when taking place outside the United Kingdom.

Thus there will now be no doubt at all that an offence committed on board an English registered aircraft against the dangerous drugs legislation[3] or larceny of rings[4] will be triable in England. The law to be applied in the State with jurisdiction is a matter of internal local law. The Act does not seek to resolve conflicts of laws,[5] but it does ensure that there is at least one State lawfully entitled and obliged to exercise jurisdiction. There can be no doubt that the English courts will apply English law.[6] As Johnson says:[7]

> Basically the Convention provides for the operation of the law of the flag . . .[but] . . . provides also for the exercise of jurisdiction according to the territorial principle, the active nationality principle, the passive nationality principle, the protection principle and the universal principle. So there is a danger that, whereas in the past there has sometimes been insufficient jurisdiction with regard to crimes committed on board aircraft, there may in future be too much.

[1] Article 3 (2). [2] s. 1 (1).

[3] *R.* v. *Martin*, [1956] 2 Q.B. 272; [1956] 2 W.L.R. 975; [1956] 2 All E.R. 86; (1956) 40 Cr. App. R. 68; *Law Quarterly Review*, 72 (1956), p. 318; *Scottish Law Times* (1956), p. 139; *Law Journal* 106 (1956), p. 419; this *Year Book*, 33 (1957), p. 149, Devlin. J., [1956] *Cambridge Law Journal*, p. 165 (drugs offence alleged to have been committed on aircraft flying from Bahrein to Singapore). Decision No. R(S) 8159, I.L.R., 27 (1963), p. 115

[4] *R.* v. *Naylor*, [1962] 2 Q.B. 527; [1961] 3 W.L.R. 898; [1961] 2 All E.R. 932; (1961) 45 Cr. App. R. 69, Lord Parker L.C.J., *Law Quarterly Review*, 78 (1962), p. 23. *Cox* v. *Army Council*, [1963] A.C. 48; [1962] 2 W.L.R. 950; [1962] 1 All E.R. 880; (1963) 46 Cr. App. R. 258; *Law Quarterly Review*, 79 (1963), p. 461; D. W. Bowett in this *Year Book*, 37 (1961), p. 554; ibid., 38 (1962), p. 472. *U.S.* v. *Cordova* (1950), U.S. Av. R. 1; 89 F. Supp. 298. U.S. Congress Law 1952 and 1961 (to deal with 'hi-jacking'), 18 U.S.C. sec. U.S. 7 (5) 1958; Glanville Williams, 'The Ambit and Venue of the Criminal Law', *Law Quarterly Review*, 81 (1965), pp. 287–8, 417–21. *Dicey and Morris* (10th ed., 1967); McNair, *The Law of the Air* (3rd ed.), pp. 271–81.

[5] O'Connell, *International Law*, vol. 1, pp. 586–8; McNair, *Law of the Air* (3rd ed.), Jurisdiction and choice of law, pp. 259–306, especially 260–80.

[6] McNair, ibid., pp. 279–80.

[7] D. H. N. Johnson, *Rights in Air Space*, pp. 78–9. *Shawcross and Beaumont on Air Law*, pp. 703–6; Convention, Article 4. Lester, 'Crimes on Aircraft', *New Law Journal*, 117 (1967), p. 497.

However, the principle *non bis in idem*, probably a general principle of law recognized by civilized nations, should operate as a protection against the risk of double jeopardy.[1] If the offender finds himself in Scotland he will be tried according to Scottish law in respect of the alleged offence on the aircraft; if he finds himself in England, then English law applies.[2] A Scotsman in Scotland may not be removed to England and there tried for an offence alleged to have been committed on board an aircraft which is an offence in English law and not in Scots law.[3] A Frenchman will be tried in England in accordance with English law in respect of an offence alleged to have been committed on a U.K. registered aircraft, even though the aircraft was flying over France at the time and the act does not constitute an offence by French law.

The consent of the Director of Public Prosecutions is required for any proceedings to be brought in England,[4] because without such safeguard there might be a danger of aliens who were travelling in British aircraft being liable to prosecution for some minor offence under English law of which they were entirely ignorant; for example, a foreign doctor may carry dangerous drugs in a British aircraft flying from Karachi to Rangoon but there would seem to be no reason why he should be prosecuted in England for this. This restriction does not apply to offences under the Civil Aviation Acts 1949 to 1962.

'British-controlled aircraft'[5] includes: (*a*) British registered aircraft; (*b*) certain non-registered aircraft, such as aircraft in progress of development;[6] (*c*) what are known as interchange aircraft, i.e. an aircraft registered in another country, chartered by demise to a person qualified in the United Kingdom to register—because he lives or carries on his business here—and operated by the qualified person, e.g. B.E.A. operate Greek-registered aircraft under an interchange agreement with Olympic Airways.

The Act excludes military aircraft or an aircraft which, although not a military aircraft, belongs to, or is exclusively employed in, the service of the Crown; but the exclusion may be revoked by Order in Council.[7] Civil aircraft employed extensively by civil operators in troop carrying are included under the Act. Similarly police and customs aircraft are included, although they may be excluded by the terms of the Convention.[8] The Chicago Convention 1944 distinguishes between State aircraft and civil aircraft, and aircraft used in military, customs and police services are deemed to be State aircraft.[9]

The United Kingdom dependencies are included within the scope of the Act.[10]

An aircraft is 'in flight' from the moment when power is applied for the purpose of the aircraft taking off on a flight until the moment when the landing run (if any) at the termination of that flight ends.[11] The inclusion of the phrase 'if any', not contained in the Convention, evidently envisages the possibility of a vertical landing aircraft.[12]

To meet the case of the joint air transport organisation or international operating agency—e.g. eleven African States of limited resources have joined together under the Yaounde Convention 1961 to form Air Afrique, with registration of the aircraft in the Ivory Coast—the Act provides that the organization is to be treated as registered

[1] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, pp. 337–8.

[2] s. 1 (3). [3] s. 1 (3). [4] s. 1 (2). [5] s. 7 (1).

[6] Air Navigation Order 1966 S.I. No 1184 (as amended S.I. No. 1408), Article 1. Thus the Act goes beyond the Convention in this respect, though the occasions for exemption from registration are very rare.

[7] s. 7 (1). [8] Article 1 (4). [9] Chicago Convention 1944, Article 3.

[10] s. 8.

[11] s. 7 (2) (*a*). Cf. Civil Aviation Act 1949, s. 62 (1), which is repealed—s. 1 (3).

[12] Convention, Article 1 (3).

in one Convention country, as specified by the Board of Trade. Under the Convention, if States establish joint air transport operating organizations or international operating agencies which operate aircraft not registered in any one State, those States must, according to the circumstances of the case, designate the State among them which, for the purposes of the Convention, must be considered as the State of registration, and must give notice to I.C.A.O. which must communicate the notice to all States which are parties to the Convention. Presumably the Board of Trade will specify under the Act the State designated under the Convention.[1]

The costs of prosecutions fall upon central funds and not local funds,[2] following Admiralty procedure.

2. *Evidence*

In order to simplify proceedings and to overcome certain technical English rules of evidence, the Act provides for special simplified rules.[3] When a witness cannot be found in the United Kingdom, his deposition is admissible if it was made in the presence of the accused and before a Commonwealth judge or magistrate or before a British consul.[4] For example, following an altercation on board it may be desirable to obtain evidence from passengers, and depositions would be indicated if those passengers were resident abroad. Similarly, in order to avoid the personal attendance of officials and others, certain documentary evidence is admissible. For example, certified copies of official documents and entries in registers are admissible,[5] because they are usually of a formal nature and rarely, if ever, contested, e.g. evidence of registration in the United Kingdom, or a certificate of airworthiness validated by the Air Registration Board. H.M.S.O. documents purporting to be the publication known as the *United Kingdom Air Pilot*, which deals with technical matters such as radio wavelengths, and a publication in the series known as *Notam—United Kingdom* also prove themselves.[6] Also records from proper custody of the position of an aircraft or of any message or signal transmitted to or received from an aircraft—e.g. tape recordings or radio conversations taken in connection with air traffic control—are admissible in all civil and criminal proceedings,[7] a provision that may be important in inquiries into the causes of accidents.

3. *Powers of the commander of the aircraft*

The Act deals with the powers of the commander of an aircraft to take reasonable measures, including restraint of persons on board, in the interests of safety and of good order and discipline, and confers on him power to restrain any person who in his opinion has committed a serious crime against the law of the State of registry while the aircraft was in flight. It also makes provision in accordance with the Convention for the disembarkation of offenders and their delivery to the authorities on the ground.[8] The Act is probably declaratory of the common law, but the avoidance of doubt was rightly felt to be important. The duties and responsibilities of the commander are defined, and he is given protection from action. Broadly these duties and responsibilities are restraint, disembarkation, and delivery to the competent authorities at

[1] s. 7 (4). Convention, Article 18. [2] s. 7 (5).

[3] ss. 5 and 6, not strictly required by the Convention since rules of evidence are internal procedural matters.

[4] s. 5. [5] s. 6 (1) (*a*). [6] s. 6 (1) (*b*).

[7] s. 6 (2), extending the scope of the Civil Aviation (Eurocontrol) Act 1962, s. 5.

[8] s. 3, following the Convention, Chapter III, Articles 5–10. See *Shawcross and Beaumont on Air Law*, pp. 706–9—an excellent discussion.

the point of disembarkation. The Convention itself grew out of discussions originally initiated by the International Federation of Airline Pilots (I.F.A.P.), supported by the British Association of Airline Pilots (B.A.A.P.)

The jurisdiction of the commander runs from the moment when all external doors, if any, of the aircraft are closed following embarkation for a flight, until the moment when any such door is opened for disembarkation after the flight; and, if the aircraft makes a forced landing, any period thereafter until the time when competent authorities of the country in which the forced landing takes place take over the responsibility for the aircraft and for the persons and property on board the aircraft, viz. if the forced landing takes place in the United Kingdom, the time when a constable arrives at the place of landing.[1] The principal statutory provisions run as follows:[2]

> If the commander of an aircraft in flight, wherever that aircraft may be, has reasonable grounds to believe in respect of any person on board the aircraft—
>
> (*a*) that the person in question has done or is about to do any act on the aircraft while it is in flight which jeopardises or may jeopardise—
>
> (i) the safety of the aircraft or of persons or property on board the aircraft; or
>
> (ii) good order and discipline on board the aircraft; or
>
> (*b*) that the person in question has done on the aircraft while in flight any act which in the opinion of the commander is a serious offence under any law in force in the country in which the aircraft is registered, not being a law of a political nature or based on racial or religious discrimination,
>
> then . . . the commander may take with respect to the person such reasonable measures, including restraint of his person, as may be necessary—
>
> (i) to protect the safety of the aircraft or of persons or property on board the aircraft; or
>
> (ii) to maintain good order and discipline on board the aircraft; or
>
> (iii) to enable the commander to disembark and deliver that person . . .
>
> and . . . any British-controlled aircraft shall be deemed to be registered in the United Kingdom whether or not it is so registered and whether or not it is in fact registered in some other country.

The problem of good order and discipline and of endangering the safety of the aircraft and the passengers usually arises from an excess of alcohol taken by one or more of the passengers. Occasionally also a passenger is found to be suffering from some form of mental illness and resorts to violence, or there is a dispute between passengers leading to a fight, or trouble with an air hostess, such as over-familiarity. In the East, trafficking and administration of drugs on board aircraft is becoming a problem. The exercise of a power of restraint or arrest on an aircraft is not easy, because of the absence of any suitable place to imprison or restrain offenders. In practice an offender has to be bundled into a toilet, but, of course, the lock is usually operated from the inside. A 'restraint cubicle' may have to be built into aircraft in the future. In one respect the Act goes further than the Convention in that it does not limit the exercise of powers by the commander to flights that commenced or terminated outside the State of registration.[3] The expression 'serious offence' might appear to be somewhat vague and uncertain and indeed was objected to by the British delegation at Tokyo. However, as the test is a subjective one for the commander it is hoped that no difficulty in interpretation will arise in practice. A detailed list of offences might have imposed an unrealistic burden on a commander, who may not have had the advantage of legal training.

[1] s. 7 (2) (*b*). [2] s. 3 (2). [3] s. 3. Convention, Article 5.

The period of restraint may run for as long as is necessary and appropriate. In the case of a threat to safety the commander simply disembarks the culprit and leaves him to cool off and to continue his journey in some other way. In the case of a serious offender the commander may deliver him to the appropriate authorities to be dealt with under the criminal law.[1] The commander must report to the appropriate authorities an intention to deliver any person by way of disembarkation, with reasons, and also the fact of disembarkation.[2] An instruction in general terms will be issued to commanders to give notice by radio as soon as possible to air-traffic control that they intend to deliver a suspected offender. That will introduce a routine applicable to everybody and will give a means by which the presence of the suspected offender and the intention to deliver him can be established. Notification must be made also to the appropriate diplomatic or consular office of the country of nationality of a passenger who is disembarked,[3] so that the passenger may not be left unprotected, perhaps with no ticket, in a possibly strange and unexpected place, perhaps miles from anywhere. There is no duty to pay for the cost of the subsequent carriage of a disembarked passenger to his original destination. The disembarkation discretion of the commander is certainly very wide, for he may disembark a passenger anywhere (though nothing in the Act or Convention obliges any State to accept entry of an alien), and it may be that the commander may make a mistake, albeit bona fide, in respect of a passenger. The passenger has a remedy by way of a right of action against the commander if it can be shown that the commander acted without reasonable grounds, i.e. in effect acted in bad faith. Any member of the crew and any passenger may, and at the request of the commander must, render assistance in restraining any person whom it is proper to restrain.[4]

4. *Piracy*

So as to avoid doubt, the Act[5] makes it quite clear that the law relating to piracy contained in the Geneva Convention on the High Seas of 1958[6] applies to piracy

[1] s. 3 (5). Convention, Articles 8 and 9. [2] s. 3 (6). Convention, Articles 8 (2) and 9 (2).

[3] s. 3 (6) going further than the Convention requires.

[4] s. 3 (3). This provision in the Convention did not find favour with the Soviet or Eastern Bloc, who do not approve of ordinary citizens being involved in law enforcement without official authorization, and it may be that it will be an obstacle to ratification. [5] s. 4 and Schedule.

[6] Articles 15, 16 and 17. Article 15 says:

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(*a*) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(*b*) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph (1) or sub-paragraph (2) of this article.

Article 16 says:

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17 says:

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of the act.

committed by, or against, an aircraft.[1] The Convention contains a provision relating to unlawful seizure of aircraft, which is as follows:[2]

1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

Thus the only offence specifically dealt with in the Convention is directed against 'hi-jacking', which is unfortunately all too prevalent.[3]

5. *Extradition*

For the purpose of extradition a crime is deemed to have been committed in the territory of the State of registry, as well as in the State over which the aircraft may have been flying.[4] Thus in respect of an offence committed in a French registered aircraft flying over Germany at the material time, both France and Germany, assuming them to be parties to the Convention, would be entitled to claim extradition from the British Government, in accordance with the terms of any extradition treaty in force, if the alleged offender were found in the United Kingdom. The Act does not contain any special provision to resolve this conflict.

[1] The Tshombe incident over the Mediterranean in June 1967, which may have been committed by a passenger against the aircraft, the commander, and Tshombe from motives of private or personal animosity, may have been an act of piracy. Cf. Keith Kyle, 'Congo Conspiracies', *The Listener*, 10 (August 1967), p. 179. Convention, Article 11. Algeria has not ratified the Convention and, in fact, was not represented at Tokyo. For the seizure on 22 July, 1968, of an Israeli aircraft over the Mediterranean by the Popular Front for the Liberation of Palestine, based in Algeria, see *Hansard*, House of Lords, vol. 296, cols. 399–403, 1 August 1968.

[2] Article 11.

[3] Cf. the United States experience; Tshombe incident over Mediterranean, June 1967. See also *Canadian Yearbook of International Law*, 2 (1964), p. 199, n. 6.

[4] s. 2. Extradition Act 1870. Fugitive Offenders Act 1967. Convention, Article 16. European Convention on Extradition 1957. *Shawcross and Beaumont on Air Law*, pp. 713–14.

THE OUTER SPACE TREATY*

By H. G. DARWIN

THE Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies,[1] which was opened for signature in London, Moscow and Washington on 27 January 1967, entered into force on 10 October 1967, and has now about thirty parties, is a milestone in the development of the international law of outer space. It has its own importance as a legal instrument; but, being closely connected with other texts, it must also be seen in its context. It falls within one of the most rapidly developing branches of international law which concerns the peaceful and orderly regulation of new environments opened up by new techniques, beginning with the Antarctic Treaty[2] signed at Washington on 1 December 1959, passing by way of the Test Ban Treaty[3] (if we may slightly stretch the definition), to the present active debates on the deep sea floor resulting from a proposal by the Government of Malta, which led to General Assembly Resolution 2340 (XXII) of 18 December 1967.

I. THE BACKGROUND TO THE TREATY

The story of the Outer Space Treaty may be briefly told. Its parentage is disputed. The Soviet Union regard it as a late and grudging acceptance by others of their thesis that the first step to be taken was, as they had proposed in 1958, an international treaty on co-operation in the exploration and peaceful use of outer space. The United States regard it as an expansion of their proposal for a treaty governing the exploration of the moon and other celestial bodies, which was made by President Johnson on 7 May 1966, but enlarged to cover activities in outer space. In this instance, the strength of the infant is more important than its parentage.

When the Legal Sub-Committee of the Outer Space Committee met at Geneva on 12 July 1966, there were before it two drafts, both dated 16 June, submitted by the United States and the Soviet Union respectively.[4] The debate continued in meetings first in the Sub-Committee, and partly in a Working Group on the whole open to the public but without records, until 4 August; the resulting agreed articles were recorded but important differences remained.[5] The Sub-Committee in New York made no progress during September, but after informal consultations further meetings in December 1966 registered a completed draft. This text was presented to the First Committee and the Plenary of the General Assembly, where Resolution 2222 (XXI) to which the draft Treaty was annexed was adopted unanimously. The Treaty was opened for signature in London, Moscow and Washington on 27 January 1967 and it entered into force on 10 October 1967.

* © H. G. Darwin, 1968.

[1] *United Kingdom Treaty Series*, No. 10 (1968), Cmnd. 3519.

[2] Ibid., No. 97 (1961), Cmnd. 1535.

[3] The Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, signed at Moscow, on 5 August 1963, *United Kingdom Treaty Series*, No. 3 (1964), Cmnd. 2245.

[4] Circulated as U.N. Docs. A/AC. 105/32 and A/6352 respectively.

[5] The agreed texts and outstanding proposals are in Annexes II and III of the Report of the Legal Sub-Committee of 16 September 1966 (A/AC. 105/35).

Much of the text of the Outer Space Treaty is not original. Two treaties have contributed to its text, the Antarctic Treaty[1] and the Test Ban Treaty.[2] The Antarctic Treaty contributed important substantive provisions; the Test Ban Treaty, though politically closely related to the Outer Space Treaty, contributed only to its formal and final clauses, and especially the device of the three depositaries. This is because the Test Ban Treaty, though it applies in outer space, is mainly a treaty to regulate a new technique, not a new environment, whereas the Antarctic Treaty is intended to regulate a new environment. These two treaties were negotiated in a restricted form and were only subsequently opened to the world at large. But the Outer Space Treaty was, by contrast, developed within the framework of the United Nations and submitted to its organs for approval. And this supports and strengthens both the Treaty and the United Nations. It is true that much of the work on the Treaty was done by informal discussions both between the United States and the Soviet Union and between those two delegations and their friends, but this is only to be expected in any political body. In the political structure of a country, there are many institutions and practices essential to its running which are not to be found in books on constitutional law. It would be surprising if it were otherwise in the United Nations. The United Nations served as a channel to harmonize and give form to the common desires of all who contributed to the Outer Space Treaty.

Apart from the two Treaties just discussed, the Outer Space Treaty draws for Article IV on General Assembly Resolution 1884 (XVIII) of 17 October 1963. That resolution welcomed expressions by the Soviet Union and the United States of their intention not to station in outer space any objects carrying nuclear weapons or other kinds of military weapons of mass destruction, and called upon all States to refrain from placing such weapons or from stationing them in outer space in any other manner and to refrain from causing, encouraging or in any way participating in the conduct of the foregoing activities. The resolution is sometimes spoken of as an agreement and so it may be in political terms; but in fact, from a legal point of view, it falls far short. In it, the General Assembly merely records a common expression of intention and makes a recommendation presumably under Article 10 or 11 of the Charter of the United Nations. This is hardly adequate to create an agreement at international law; and to that extent, Article IV of the Outer Space Treaty represents the conversion of a political commitment into a legal obligation.

The greater part of the Outer Space Treaty, however, derives not from the sources already mentioned but from General Assembly Resolution 1962 (XVIII), the Declaration of Legal Principles governing Activities of States in the Exploration and Use of Outer Space, which was adopted unanimously by the General Assembly on 13 December 1963.

That Declaration has formed the basis of most discussion of the international law of outer space, and it has many commentators. If Haley[3] may be the main commentator on the uncodified law, Jenks[4] may be the principal glossator of the codified text of Resolution 1962 (XVIII). It is not necessary therefore to enter into a discussion of its contents here, though of course some of the comments made below on the terms of the Treaty apply also to the same wording in the Declaration.

It may, however, be of interest to consider what is the legal effect of creating a treaty obligation where there were before only the terms of a Declaration made by a resolution of the General Assembly.

[1] See above, p. 278, n. 2.
[2] See above, p. 278, n. 3.
[3] *Space Law and Government* (1963).
[4] *Space Law* (1965).

Resolution 1962 (XVIII) is entitled a 'Declaration'. But this alone cannot give it status higher than the Charter of the United Nations in Chapter IV accords to Resolutions of the General Assembly. An interesting and authoritative account of the nature of 'Declarations' made by the General Assembly is contained in a Memorandum by the Office of Legal Affairs in the U.N. Secretariat on the use of the terms 'declaration' and 'recommendation'.[1] This account seems of interest in the present discussion. The Memorandum suggests that a 'declaration' is more formal and solemn, but that otherwise 'there is probably no difference between a "recommendation" and a "declaration" in United Nations practice as far as strict legal principle is concerned'. A declaration or recommendation cannot be binding as a treaty is binding, merely by the device of terming it a declaration. The Memorandum continues: 'However, in view of the greater solemnity and significance of a declaration, it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.' Though the Memorandum just quoted was prepared in connection with consideration of the form to be taken by the Draft Principles on Freedom and Non-Discrimination in the matter of Religious Rights and Practices, much of what is said seems highly relevant to the Declaration under discussion.

The name given to the instrument is clearly not the only factor. The qualification of the content of the Declaration as 'Legal Principles governing the Activities of States' is also not overriding; many of the operative paragraphs concern matters which are legal by their content, such as national appropriation, responsibility and liability, but this does not necessarily mean that the principles set out have the status of binding rules of law.

Perhaps the most important element is the declaratory words, 'Solemnly declares that in the exploration and use of outer space States should be guided by the following principles.' This wording especially by using 'should be guided' falls short of purporting to create existing law.[2]

This view is consistent with the contemporary statements made at the time of the Declaration. Thus the United States representative in the First Committee of the General Assembly said that the United States 'considered that the legal principles contained in the operative part of the draft declaration reflect international law as accepted by the Members of the United Nations'.[3] But the word 'reflect' shows that the Declaration did not create law but only recorded or expressed it. And he went on to say that the United States '*intended* to respect them and hoped the conduct they *recommended* . . . would become the practice of all nations' (italics added). The Soviet representative preferred, by way of comment on the expression of intention by the United States quoted above, simply to say that the Soviet Union 'undertook to respect the principles enunciated in the draft declaration if it were unanimously adopted'.[4] Similarly, the representative of the United Arab Republic—

[1] U.N. Docs. E/CN. 4/L. 610 of 2 April 1962, also quoted extensively in E/3616/ Rev. 1, the Report of the Eighteenth Session of the U.N. Commission on Human Rights 1962, at para. 105.

[2] In taking this view, the present writer departs with respect from the view taken by Jenks in *Space Law* (1965), at p. 185, where he appears to recognize a somewhat greater legal effect for the Declaration.

[3] *G.A.O.R.*, 18th Session, 1st Committee, 1342nd Meeting, 2 December 1963, p. 159.

[4] Ibid., p. 161.

with some criticism of the text—said that, in view of the reservations of members, 'the universality of those norms could be established only to the extent that they were accepted and put into practice'. There was in addition a particularly interesting statement in the United Nations Outer Space Committee by the representative of Australia, in which he said: 'While in our view a General Assembly Declaration of legal principles cannot itself be creative of legal duties, it is equally not the Australian delegation's view that such a General Assembly Declaration can have no part in the development or creation of international law. It is our view that a Declaration of legal principles by the General Assembly, especially if universally adopted and adhered to in practice, may be valuable evidence of international custom, which in turn is a most important source of law.'[1] The Soviet representative at the same meeting emphasized the need for unanimity.

In 1966, when these legal principles were incorporated in the draft of the Outer Space Treaty, while many words in praise of the Declaration were spoken, the view suggested above on the legal status of the Declaration was confirmed. Thus the United States representative spoke of 'the recommendations made by the General Assembly in its Resolutions 1962 (XVIII) and 1884 (XVIII);[2] the Soviet representative contrasted his own proposal for a Declaration to be signed which would have 'the binding force of an international agreement' with the actual Declaration which was only adopted by the General Assembly.[3]

If then it is agreed that the principles in the Declaration could become established as legal rules by virtue of practice, how much practice has there been which could be cited in support? It is difficult to see how operative paragraph 1 which concerns use for the benefit of all mankind could be confirmed or negated by practice; perhaps the U.A.R. representative was correct in suggesting that it could hardly be called a legal principle.[4] Operative paragraph 2 which concerns freedom of use accords with practice. Operative paragraph 3, which precludes national appropriation, has been supported by practice in that both the Soviet Union and the United States in sending space vehicles to the moon have disavowed any intention to lay claim to territory. But operative paragraph 4 and the later paragraphs with one exception have only been supported by what might be called negative practice, that is to say, no State has done any specific act avowedly contrary to them or which has been the subject of protest as contrary to them. The exception is that the United States, in connection with the 'West Ford' experiment involving the distribution in space of large numbers of copper needles in 1963, was accused of interfering with the activities of other States. The evidence of practice in support is not very strong.

How important the Outer Space Treaty is, depends in part on how firmly the law was established before on the matters dealt with in it. It appears from the foregoing that the law was not firmly established before the Treaty. It is true that some uncertainties resulting from general wording in earlier instruments and texts have been carried over into the Treaty. It is also true that the effectiveness of the Treaty is dependent on its obtaining wide participation, especially among space powers. But it is also certain that, in point of legal status, the Treaty places the rules in a much firmer position at least as regards parties than they were before it.

[1] U.N. Doc. A/5549/Add. 1 of 27 November 1963, Annex, p. 15, also later distributed in corrected form as U.N. Doc. A/AC. 105/PV. 24 of 20 March 1964.

[2] *G.A.O.R.*, 21st Session, 1st Committee, 1492nd Meeting, 17 December 1966, p. 428.

[3] Ibid., p. 429, though the summary does not include this point. It is to be found in U.N. Doc. A/C. 1/PV. 1492 which is the verbatim record of the meeting.

[4] *G.A.O.R.*, 18th Session, 1st Committee, 1342nd Meeting, 2 December 1963, p. 163.

II. PROVISIONS OF THE TREATY

The Outer Space Treaty is on many points expressed in general terms. It was universally recognized that further work was required and, in addition to the earlier subjects of assistance and return of astronauts and liability for damage caused by space objects, the definition and the utilization of outer space as well as space communications have already been suggested as possible fields of work. But its content is still of great importance.

The Treaty shows three interwoven strands. They are foreshadowed in the preamble in the second, third and fourth paragraphs, which are the only ones to deal with the substance of the Treaty. The three strands are the free and common use of outer space including the celestial bodies, the disarmament measures to be applied there, and the means of co-operation in its use.

(*A*) *The free and common use*

The free use of outer space is reflected in Article I where the second paragraph expressly provides that outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States and that there shall be free access to all areas, this provision being an element drawn from the Antarctic Treaty, and one which is also of some importance as a measure of disarmament. In the third paragraph of that Article, the freedom of scientific investigation is also established.

The common use, i.e. the use for the benefit and in the interests of all, is clearly established in Article I, first paragraph, but the working out of this principle is not dealt with in the Treaty. Some uses of direct and evident benefit to mankind are already becoming possible; thus, the World Weather Watch under the auspices of the World Meteorological Organisation has benefited from observations from satellites, especially to follow and analyse the course of tropical storms.

Article III, in so far as it provides that international law including the Charter of the United Nations extends to outer space, and for the maintenance of peace and security, might be said to follow from the principle of common use in that this ensures at least a framework of order for activities there.

As a corollary of free use, it follows that no State is able to establish an exclusive title to any part of outer space. This is the aim of Article II of the Treaty, which excludes 'national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'. This provision destroys the basis of any view that outer space including celestial bodies is *res nullius* and open to appropriation by the taking of possession, namely, effective occupation. Since title by occupation has played a large part in international law as applied on earth, it is important that this principle should be so firmly disavowed when mankind comes to deal with outer space including celestial bodies.

During the discussion of Article II there was some criticism of it, especially in point of terminology, on both technical and substantive grounds. It was said that the term 'appropriation' was incorrectly used in that it belonged to the sphere of municipal law and concerned private property. Whatever may be the customary legal use of the French term, it is doubtful whether this criticism can be justified by legal usage of the English term 'appropriation' which can certainly be used of States taking title in international law as well as individuals taking title in municipal law. The substantive objection is more valid, namely, that many types of 'use', or '*exploitation*' to use the French wording, are inconceivable without appropriation of some degree

at least of any materials taken. Thus, mineral deposits can hardly be exploited without appropriation. But we are here concerned not with gravel or minerals on the sea-bed but with the surface of the moon. And it is sometimes said that, if the moon consisted entirely of diamonds, it would not be profitable for anyone to go there to pick them up. The criticism made, though sound in form, is not a serious objection in this environment, though the answer to it depends on existing or at present foreseeable technology. This was fortunate because, if industrial exploitation were possible, one might ask how far and in whose favour appropriation as a result of exploitation could be recognized. This would in turn raise questions how far concessions should be granted or commercial enterprises, whether State-owned or private, should enter into the legal framework to be established. It is doubtful whether such questions could, or indeed in the absence of practical experience, should be settled in such an instrument as the Outer Space Treaty. They are likely to cause enough difficulty in environments, where they may soon have reality, such as the deep ocean floor, without attempting to settle them in an environment, where they must at best arise only in the speculative future.

Article VIII which provided that a State retains jurisdiction and control over objects launched is in some sense the corollary of Articles I and II. It denies any assertion that an object launched into space has been abandoned, but this is self-evident since normally a State will have no intention of abandoning it during its useful flight. But the more important aim is to deny any claim that the States over which it pasres *ipso facto* acquire jurisdiction, control or ownership. The provision thus is the counterpart to Article I in that this provision is necessary to freedom of use, and to Article II in that it denies that the underlying State can claim to exercise rights by virtue of passage by the space object through superjacent space.

The responsibility of governments for activities in outer space and their liability for damage resulting from activities there, which are dealt with in Articles VI and VII, may again be said to be the counterpart of free and common use. But the discussion about responsibility has concerned mostly non-governmental activities and international organizations. In general, State responsibility for non-governmental activities is accepted, though that question may be raised again by the renegotiation scheduled for 1969 of the Interim Communications Satellite System established under the Agreement signed in Washington on 20 August 1964,[1] since that System is a hybrid with governmental and non-governmental features. The question of liability has provoked long argument so far without any agreement. The difficulty of the subject is well known and it is significant that an Indian proposal to insert 'absolute' before 'liability'[2] in Article VII was not accepted on the ground that this was only one of the questions to be considered in the continued negotiations which were foreseen even at the time when this Article was adopted.

(*B*) *The disarmament aspects*

The Treaty contains important disarmament measures.

Article IV, first paragraph, contains an express undertaking not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, instal such weapons on celestial bodies, or station such weapons in outer space in any other manner. This represents the wording of Resolution 1884

[1] The Agreement establishing Interim Arrangements for a Global Commercial Communications Satellite System, *United Kingdom Treaty Series*, No. 12 (1966), Cmnd. 2940.

[2] U.N. Doc. A/AC. 105/35, Annex III, Working Paper No. 21, p. 10.

(XVIII). But in addition it represents the conversion of common declarations of intention supported by a recommendation of the General Assembly into a specific treaty obligation.

Article IV, second paragraph, provides that the moon and other celestial bodies shall be used exclusively for peaceful purposes and forbids the establishment of military bases, installations and fortifications and certain specific military activities. But the use of military personnel for scientific research or other peaceful purposes is not prohibited, and the use of any equipment or facility necessary for peaceful exploration is not prohibited.

This provision is based fairly closely on Article I of the Antarctic Treaty. The sentences relating to personnel and equipment, the latter of which is limited to exploration as distinct from use, represented a difficult compromise reached at a late stage in negotiations.

Article XII must also be considered in this context. It provides that all stations, installations, equipment and space vehicles on the moon and other celestial bodies shall be open to representatives of other States parties to the Treaty, on a basis of reciprocity, subject to reasonable notice so that appropriate consultations may be held and that maximum precautions may be taken to ensure safety and to avoid interference with normal operations. This text also represented a compromise. Originally the United States wanted complete freedom of inspection as in Article VII (3) of the Antarctic Treaty,[1] while the Soviet Union proposed that inspection should take place only as a result of a specific agreement on the time of visit to be reached subsequently.[2] The existing text falls between the two in that advance notice is required and also appropriate consultations. These consultations are the weak point in the clause in that they might be unreasonably protracted, or even delayed on the ground that the form of consultations proposed was not appropriate. But the rigour of the environment seems likely to make consultations in practice necessary and at least there is no precondition of a specific agreement; an attempt to evade or unreasonably delay inspection would probably be seen for what it was.

This right of inspection is clearly of the first importance as a support to the disarmament provisions of the Treaty. It is significant that it does not apply in outer space generally but only on the moon and other celestial bodies, which is the same area as is reserved exclusively for peaceful uses.

The main omission from Article IV is obvious but it is deliberate. There is no provision requiring that outer space shall be used for peaceful purposes only. Even at the time of the Declaration of Legal Principles, several delegations regretted the absence of such a provision. The United States had never accepted this both because of the ambiguity of the expression and because it was common knowledge that ballistic missiles pass through outer space in operation. Though the Soviet Union had supported this principle in earlier years, by the time of the adoption of the Declaration of Legal Principles, their position had changed; the Soviet representative then said, 'The Declaration did not, and indeed could not, touch the use of space for military purposes. . . . The U.S.S.R. could not agree to the separation of that problem', the problem of prohibiting the use of outer space for military purposes, 'from other disarmament measures directly related to it, such as the elimination of military bases in foreign territories'.[3]

[1] Article 6 of the original U.S. Draft Treaty, U.N. Doc. A/AC. 105/32.

[2] The Soviet Draft Treaty initially contained no provision on this subject, but one was introduced by Soviet Working Paper No. 23, U.N. Doc. A/AC. 105/35 Annex III, at p. 12.

[3] *G.A.O.R.*, 18th Session, 1st Committee, 1342nd Meeting, 2 December 1963, p. 161.

During the drafting of the Treaty, the Indian delegation proposed an amendment to confirm that the parties to the Treaty (or all States) undertake to use outer space and the celestial bodies exclusively for peaceful purposes.[1] Brazil, Mexico and some other delegations gave some support to this principle[2] But the Indian amendment was not generally acceptable. However much one may regret it, it is difficult to foresee any general acceptance, in the context of wider measures of disarmament, of a reservation of outer space for peaceful purposes, whatever that may mean, if the attempt was to exclude all use for defence purposes.

(*C*) *International co-operation*

The Treaty in the Preamble speaks of the need and desirability of international co-operation; Article I requires States to facilitate and encourage co-operation in scientific investigation; Article III requires activities to be carried on in the interests of promoting international co-operation and understanding where co-operation is not of course intended to be limited to the field of outer space. The free and common use of a resource does not necessarily imply co-operation, as the whales of the world, a common resource, now nearly brought to extinction for lack of international co-operation, bear tragic witness. The periodic reports on national and international activities[3] circulated by the Secretariat of the United Nations relating to outer space show too many examples for it to be possible to survey them here. It is to be hoped that this co-operation can be still further extended.

Article V which requires that assistance and return be granted to astronauts, and that dangerous phenomena in outer space should be promptly reported, is a practical example of co-operation. This principle has already been elaborated in the United Nations by the preparation of an Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space which was commended by the General Assembly in Resolution 2345 (XXII) of 19 December 1967 and subsequently opened for signature on 22 April 1968.

Article IX expressly enjoins the principle of co-operation and mutual assistance and due regard for the activities of other parties. It also seeks to prevent contamination to outer space or to the earth from extraterrestrial activity. The third element in the Article is an attempt to provide a procedure to give effect to the earlier elements. It requires any party to the Treaty which believes its space activities may affect those of other parties to undertake appropriate international consultations before proceeding to any such activities. It also authorizes any party which has reason to believe that the space activities of another party would cause potentially harmful interference with its space activities to request such consultation. So far there has been no need to invoke these procedures but the widespread international concern at the time of the U.S. experiment 'West Ford' mentioned above shows the need for them. The manner of international consultation clearly depends on what the problem is. Probably technical consultations would be the appropriate way of proceeding, but presumably action in the United Nations is not excluded.

One of the last questions to be solved was that dealt with by Article X, namely, the 'opportunity to observe the flight of space objects', commonly called tracking facilities.

[1] U.N. Doc. A/AC. 105/C. 2/SR. 66

[2] See statements in U.N. Doc. A/AC. 105/C. 2/ SR. 71.

[3] Cf., e.g., The Review of National and Cooperative International space Activities, U.N. Doc. A/AC. 105/L. 36, 5 June 1967, and the Review of the Activities and Resources of the United Nations of its specialized Agencies and of other competent International Bodies relating to the Peaceful Uses of Outer space U.N. Doc. A/AC. 105/C. 1/L. 20, 30 June 1967.

This was a Soviet proposal which originally required the parties to the Treaty to undertake to accord 'equal conditions to States engaged in the exploration of outer space' but which was later narrowed so as to cover only tracking facilities. In the discussions in the First Committee of the General Assembly the United States representative said that 'It was quite clear from the text that there must be agreement between the parties concerned for the establishment of tracking facilities and it properly incorporated the principle that each State which was asked to co-operate had the right to consider its legitimate interests in reaching its decision'.[1] A number of other delegations made similar statements.

Article XI, in which States parties to the Treaty agree to inform the Secretary-General as well as the public and the scientific community about their activities in outer space including the moon and other celestial bodies, also gave rise to considerable argument during the work on the Treaty. Originally it was a proposal by the United States creating an unqualified obligation to give information about activities on celestial bodies, while the Soviet Union objected to any provision calling for the furnishing of information except on a voluntary basis. The final provision confirms the obligatory character of the provision, subject only to the qualification, 'to the greatest extent feasible and practicable' drawn from Article III (1) of the Antarctic Treaty, and extends the activities on which information is required to cover outer space generally as well as the celestial bodies.

(*D*) *International organizations and final provisions*

Throughout the discussion of agreements relating to outer space, a number of delegations, including the United Kingdom, have sought to ensure that the regime established takes account of the activities in outer space of international organizations. Obviously members of the European Space Research Organization and the European Launcher Development Organization have an especial interest in this, but the Interim Communications Satellite System is another example. Operative paragraph 5 of Resolution 1962 (XVIII), the Declaration of Legal Principles, provides that 'when activities are carried out in outer space by an international organization, responsibility for compliance with the principles set forth in this Declaration shall be borne by the international organization and by the States participating in it'. This gives clear recognition to the practice of such activities by international organizations. The provision is repeated in Article VI of the Outer Space Treaty.

As soon as the principles are incorporated in a treaty having legal force, especially if this is drafted in terms of 'States parties to the Treaty', the situation becomes different. Where one is concerned with a Declaration, which, if it has legal force, operates under general international law, States acting collectively through an international organization can be expected to obtain the rights as well as becoming subject to the duties under it. On the other hand, where the relevant instrument concerned is an international treaty operating *inter partes*, this is not so clear. It therefore becomes appropriate to make clear that international organizations can enjoy the rights granted by the Treaty. The last sentence of Article VI which imposes responsibility for compliance with the Treaty on organization and their members is of doubtful force as against international organizations, and it was argued by the Australian representative[2] that, in so far as it purported to impose responsibility on any organization, it was inappropriate and of no effect since organizations were not parties. But it is certain

[1] *G.A.O.R.*, 21st Session, 1st Committee, 1492nd Meeting, 17 December 1966, p. 430.
[2] U.N. Doc. A/AC. 105/C. 2/SR. 71, at p. 16.

that, if this provision is to be accepted, rights as well as responsibilities should be enjoyed by international organizations and the States members of them.

The United Kingdom delegation therefore proposed a draft article which dealt with this matter completely.[1] This article provided that, if an international organization transmitted a declaration accepting and undertaking to comply with the provisions of the Treaty, then all the provisions except the articles which relate to signature, ratification and accession shall apply to the organization as they apply to a State which is a party to the Treaty. The proposal included also additional paragraphs whereby the States parties to the Treaty undertook to use their best endeavours to ensure that an international organization of which they were constituent members would make the declaration and also to ensure that until such time as the declaration was made, the organization would, subject to reciprocity, act in accordance with the principles set out in the Treaty. This proposal was severely criticized by the Soviet Union and other Communist delegations on the ground that it appeared to equate international organizations with States and also that it would make possible evasion through the formation of international organizations. These delegations were at first very reluctant to go beyond Article VI of the Treaty. However, at the General Assembly a new article was proposed and accepted, which became Article XIII. This provides as follows:

> The provisions of this Treaty shall apply to the activities of States Parties to the Treaty in the exploration and use of outer space, including the moon and other celestial bodies, whether such activities are carried on by a single State Party or jointly with other States, including cases where they are carried on within the framework of international inter-governmental organizations.
>
> Any practical questions arising in connection with activities carried on by international inter-governmental organizations in the exploration and use of outer space, including the moon and other celestial bodies shall be resolved by the States Parties to the Treaty, together with the appropriate international organization, or with one or more States members of that organization, which are Parties to this Treaty.

This provision substantially meets the point made, since it clearly covers all provisions including those which confer rights as well as those which impose duties. In effect, it requires that States, before becoming parties to the Outer Space Treaty, are satisfied that the international organizations of which they are members will in fact comply with the Treaty; but it also gives correlative rights. But in view of the very general character of this Treaty, this is unlikely to be a substantial difficulty. The provision for dealing with 'practical questions' could also give rise to complications which might even frustrate the effect of the Article if it were applied in bad faith. On the other hand, since international organizations do not enjoy the widespread recognition and extensive diplomatic representation which are enjoyed by sovereign States, there may well be some advantage in acknowledging that in practice one or more States may have to act on behalf of the organization. This Article was therefore found universally acceptable and incorporated into the text of the Treaty.

The final provisions including Article XIV are—except on the matters of withdrawal and amendment—generally similar to those contained in the Test Ban Treaty whereby the Soviet Union, the United Kingdom and the United States are all depositary governments of the Treaty.[2] This is the second example of such a provision,

[1] U.N. Doc. A/AC. 105/35, Annex II, Working Paper No. 17, p. 8.

[2] Cf. on this practice the comments in 'Nuclear Test Ban Treaties', this *Year Book*, 39 (1963), pp. 454–5.

but the first in a treaty drawn up within the United Nations. The United States, the United Kingdom and a number of other governments made clear that the form of this provision, whereby the Treaty is open to 'all States', did not involve recognition and was acceptable only in view of the subject matter.[1]

The Treaty includes, in Article XVI, a withdrawal clause requiring notice of one year before withdrawal. It is perhaps inevitable that a treaty which concerns important disarmament issues may not last very long after the parties to it have lost confidence in compliance with it. The Treaty contains a provision prohibiting the placing of weapons of mass destruction in orbit without any procedure for inspection, and even as to installations on celestial bodies, for which inspection is provided, the procedures under Article XII in practice might make it difficult to conduct effective inspections. States, in their legitimate concern for security, may reasonably feel obliged not to give too far-reaching a commitment to continue participation in the Treaty.

The inclusion of the withdrawal clause raises an interesting question in connection with Resolution 1962 (XVIII). That resolution contained no similar clause because of its different character. Presumably, therefore, if, as a result of practice, it became a set of principles having the force of general international law, withdrawal would not be possible. A general abandonment or alteration of those rules of international law would be the way to bring them to an end. Furthermore, it may be that, if the Outer Space Treaty becomes universal in membership, it will be said that practice supporting its terms results from the Treaty and does not therefore bring about rules of general international law existing independent of the Treaty. Thus the codification of the law in the Treaty may make uncertain its development as general international law. On the other hand, the provisions of Article IV are not to be found in Resolution 1962 (XVIII) but in Resolution 1884 (XVIII), which does not claim to lay down legal principles. And these have been much strengthened by incorporation into a treaty obligation, from a legal point of view. It is well established, however, that the provisions of a treaty may be or may come to be rules of general international law, as foreseen in Article 34 of the draft Articles of the International Law Commission on the Law of Treaties,[2] and to the extent that this occurs, a withdrawal under Article XVI would be ineffective, since the same rules would arise from general international law.

III. CONCLUSION

What then can be said of the Treaty in general and of its importance in the development of world affairs and international law? Its political importance as a step in the development of world-wide co-operation, and co-operation between the two super-Powers, does not fall within the purview of this note. In the field of international law, it is not an advance of the first importance, as were the Geneva Conventions on the Law of the Sea in 1958 or the two Vienna Conventions on Diplomatic and Consular Relations in 1961 and 1963. But assuming it achieves broad participation, it places on a firm legal basis certain general legal principles which had heretofore only rested on the less clear basis of a resolution of the General Assembly. It also establishes on a firm legal basis certain disarmament measures which could be of some importance in helping towards a more safe and orderly world, and it does what can be done to close

[1] See statements in *G.A.O.R.*, 21st Session, 1st Committee, 1492nd Meeting, 17 December 1966, pp. 428 et seq.

[2] Ibid., Supp. No. 9, (A/6309/Rev 1), the *Report of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session*, p. 61.

one avenue by which the limited resources of the world might be unprofitably diverted into armaments and strategic measures. Much of the material contained in it was already in large measure, though only on a political basis, widely accepted in the international community. But it can nevertheless be regarded as a significant, useful and important step in the development of international relations, as well as the development of international law.

DECISIONS OF BRITISH COURTS DURING 1967 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. Public International Law*

Municipal law—relation to international convention

Case No. 1. Salomon v. *Commissioners of Customs and Excise*, [1967] 2 Q.B. 116, C.A. Section 258 (1) of the Customs and Excise Act, 1952, provides that where customs duty on imported goods is chargeable by reference to their value, the value shall be that laid down by Schedule 6 to the Act. Paragraph 1 of Schedule 6 provides:

> The value of any imported goods shall be taken to be the normal price, that is to say the price which they would fetch, at the time when they are entered for home use (or, if they are not so entered, the time of importation), on a sale in the open market between buyer and seller independent of each other.

Section 258 (1) of the Act has a proviso: 'Provided that, in the case of goods imported under a contract of sale and entered for home use, duty shall be deemed to have been paid on that value if, before the goods are delivered for home use, duty is tendered and accepted on a declared value based on the contract price.' In November 1963 the complainant, who was not a trader, brought into the United Kingdom a camera manufactured in the United States and received by him there as a gift. The price in the United States was £30. 10*s*. 8*d*. On the date in question cameras of the same type were on sale in the United Kingdom at the retail price of £107. 3*s*. 2*d*. (with the case) excluding purchase tax, but including customs duty of £29. 11*s*. 11*d*. The Commissioners of Customs and Excise assessed the value of the camera and case by reference to the retail price in the United Kingdom and thus claimed a customs duty of £29. 11*s*. 11*d*. The complainant disputed the assessments and the dispute was referred to arbitration under the Customs and Excise Act, 1952. Neither the arbitrator nor Megaw J.,[1] on an appeal on a special case stated by the arbitrator, accepted the principal contention of the complainant that the correct construction of the relevant statutory provisions was to take the term 'open market' to mean a market in which the buyer was the importer of goods into the United Kingdom. In support of this contention the complainant referred to the Convention on the Valuation of Goods for Customs Purposes, 1950,[2] signed at Brussels on 15 December 1950, to which the United Kingdom was a party, and pointed out that Annex I of the Convention was substantially the same as Schedule 6 of the Act of 1952, and, further, that the Interpretative Notes to the text of the Convention bore out the construction, contended for by the complainant, of the proviso to Section 258 (1) of the Act.

The Court of Appeal allowed the appeal and accepted the view that the 'open market' is the import market in which a buyer in England buys the goods from a seller overseas. Lord Denning M.R.[3] observed:

> I am confirmed in my view by looking at the international convention which preceded the Act of 1952. . . . I think we are entitled to look at it, because it is an instrument which

* © Dr. Ian Brownlie, 1968.

[1] [1967] 2 Q.B. 116, at 123.

[2] *United Kingdom Treaty Series* (1954), No. 49, Cmd. 9233.

[3] [1967] 2 Q.B. 116, at 141.

is binding in international law: and we ought always to interpret our statutes so as to be in conformity with international law. Our statute does not in terms incorporate the convention, nor refer to it. But that does not matter. We can look at it.

On the same matter Diplock L.J.[1] said:

Where, by a treaty, Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty, as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties . . .[2]

But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations.

The learned judge then dealt with the view, adopted by the court below, that the terms of a convention cannot be consulted unless the statute itself contains either in the enacting part or in the preamble an express reference to the convention which it is the purpose of the statute to implement. In his view the *Ellerman Lines*[3] case was not an authority for such a proposition and he referred to the different view taken by Maugham J. in *Hogg* v. *Toye & Co. Ltd.*[4] Diplock L.J.[5] concluded the matter thus:

I can see no reason in comity or common sense for imposing such a limitation upon the right and duty of the court to consult an international convention to resolve ambiguities and obscurities in a statutory enactment. If from extrinsic evidence it is plain that the enactment was intended to fulfil Her Majesty's Government's obligations under a particular convention, it matters not that there is no express reference to the Convention in the Statute. One must not presume that Parliament intends to break an international convention merely because it does not say expressly that it is intending to observe it. . . . The extrinsic evidence of the connection must be cogent. But here we have a convention dealing specifically and exclusively with one narrow topic, the method of valuation of imported goods for the purpose of assessing *ad valorem* customs duties. Section 258 of and Schedule 6 to the Customs and Excise Act, 1952, deal specifically and exclusively with the same narrow topic. The terms of the statute and convention are nearly identical, save that the statute omits the 'Interpretative Notes to the Definition of Value' which appear in the convention. The inference that the statute was intended to embody the convention is irresistible, even without reference to its legislative history . . .

Russell L.J.[6] dealt with the matter shortly:

I agree with the views which have been stated on reference to a treaty in aid of construction of a statute plainly intended to carry out its terms, even when that intention is not stated in the statute. Strictly, such views may, however, be *obiter dicta*. Section 6 of the Finance Act, 1951, is the first of a group of sections under the cross-heading

[1] [1967] 2 Q.B. 116, at 143.
[2] Citing *Ellerman Lines* v. *Murray; White Star Line and U.S. Mail Steamers Oceanic Steam Navigation Co. Ltd.* v. *Comerford*, [1931] A.C. 126.
[3] Note 2, above.
[4] [1935] Ch. 497, 520.
[5] [1967] 2 Q.B. 116, at 144
[6] Ibid., at 152.

'Amendments to give effect to agreements affecting customs and excise', and the cross-heading is part of the statute as a preamble; and the 1952 section and schedule with which we are concerned is a mere re-enactment of the 1951 section 6 and schedule 2.

The approach adopted toward the problem of construction by the Court of Appeal is surely correct and involves a useful clarification of the law: it would be artificial to insist on the existence of an express reference to the convention concerned in the legislation since the legislative technique for translating conventions into English law is by no means uniform[1] and the important question is the intention of the legislature in the matter in the light of the available evidence.

Territorial sea—baselines

Case No. 2. Regina v. *Kent Justices, Ex parte Lye*, [1967] 2 Q.B. 153, D.C. This decision concerns some interesting questions of the relation of international law and municipal law in the situation where the former has conferred a power and the issue is whether the municipal law agencies have exercised that power, or a part of it, validly within their own terms of reference. The problem is broadly similar to that presented by *Regina* v. *Keyn*[2] and the same statute was involved.

In these proceedings the applicants were Estuary Radio Ltd., and two directors of that company. The company had since September 1965 been broadcasting from Red Sands Tower, a disused fort some 4·9 nautical miles from low-water mark off the Kent coast. The Kent justices in 1966 found the applicants guilty on a charge of unlawfully using apparatus for wireless telegraphy, namely, a transmitter, without a licence issued by the Postmaster-General, contrary to section 1 (1) of the Wireless Telegraphy Act, 1949. The applicants moved in the Divisional Court for an order of certiorari to bring up and quash the orders of conviction then made, on the ground that the justices had erred in law and wrongly held that they had jurisdiction. Section 6 of the Wireless Telegraphy Act provided, in part:

> (1) Subject to the provisions of this section, the preceding provisions of this Part of this Act shall apply
>
> (*a*) to all stations and apparatus in and over, or for the time being in or over, the United Kingdom or the territorial waters adjacent thereto . . .

The basis of the applicants' argument concerning jurisdiction was that, when the Wireless Telegraphy Act was passed, it was the law of nations that no jurisdiction could be exercised over the open seas except within three nautical miles from low-water mark and, further, that this rule had been incorporated into English law by the Territorial Waters Jurisdiction Act, 1878. The Act of 1878 provides, in section 7, that 'the territorial waters of Her Majesty's dominions . . . means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions . . .' The prosecution relied on an Order in Council issued under the royal prerogative on 25 September 1964, which was intended to implement the Convention on the Territorial Sea and Contiguous Zone[3] signed at Geneva on 29 April 1958, which was ratified by the United

[1] See Sinclair, *International and Comparative Law Quarterly*, 12 (1963), p. 508, at pp. 528–34.
[2] (1876), 2 Ex D. 63.
[3] Misc. No. 15 (1958), Cmnd. 584.

Kingdom on 14 March 1960 and came into force on 10 September 1964. The Convention and the Order in Council provided that baselines were determined in part by the existence of low-tide elevations when these were themselves within the territorial sea. Article 5 (1) of the Order defined the expression 'low-tide elevation' as 'a naturally formed area of drying land surrounded by water which is below water at mean high-water spring tides. . . '. It was the contention of the prosecution that an elevation known as Middle Sand, which was within three nautical miles of the Kent coast, was such an elevation, and it was conceded that there was evidence before the justices which entitled them to hold that Middle Sand was a low-tide elevation. In reply the applicants argued that the Order in Council was *ultra vires*, since the Crown must be taken to have abrogated the exercise of the prerogative powers within this field by entrusting to Parliament the right to define territorial waters in the Act of 1878.

Lord Parker C.J.[1] concluded that in the Wireless Telegraphy Act, 1949, the expression 'territorial waters' meant waters over which from time to time the Crown may declare sovereignty; and in his view if it had been intended to have a more restricted connotation it would have been easy to provide accordingly. In addition his lordship considered that it was significant that, as was well known, international law on the matter was in a state of flux and therefore the boundaries of territorial waters must inevitably have been expected to change from time to time. Finally, his lordship observed:[2]

> . . . this is a matter of sovereignty; it is a matter of an extension of sovereignty over the open seas, and as such is peculiarly a matter for the Crown from time to time under the prerogative to determine. One would expect that to be done from time to time without the need for specific legislation.

Lord Parker examined in some detail the contention of the applicants that in 1878 Parliament laid down a definition of territorial waters which must have been in their minds in 1949. As he pointed out, the Act of 1878 did not lay down a definition for all purposes, dealt only with indictable offences and was concerned only with the jurisdiction of the Admiral. Furthermore, the interpretation section, Section 7, assumed that by international law the territorial waters were not necessarily confined to three nautical miles, although that limit was adopted for the purposes of the Act. His lordship pointed out[3] that the 'natural mode' of confirming international conventions as part of the municipal law of the United Kingdom is by Order in Council and referred to *The Fagernes*.[4] Blain J. also concluded that the application should be dismissed after presenting a substantially similar course of reasoning.

Salmon L.J. dissented for reasons which command respect even if they may not be universally regarded as compelling. His judgment has this preface:[5]

> I start from the point that every statute creating a criminal offence must be strictly construed. I also bear in mind that it is a principle of our courts that the criminal law should be certain. The subject ought to be able, by looking at a statute, to tell with reasonable certainty whether what he is doing or proposes to do is or is not a criminal offence.

In his view there could be little doubt that in 1949 the territorial waters adjacent to the United Kingdom were generally recognized, both by international law and municipal law, as being the open sea within three nautical miles of the ordinary low-water

[1] [1967] 2 Q.B. 153, D.C., at 173.
[2] Ibid., at 174.
[3] Ibid., at 176.
[4] [1927] P. 311.
[5] [1967] 2 Q.B. 153, D.C., at 179.

mark without account being taken of low-tide elevations. The construction of the Act of 1949 according to which 'territorial waters' meant 'waters to which the territorial sovereignty of Her Majesty may from time to time extend' made the criminal law quite uncertain. His lordship could not believe that Parliament intended to create an offence dependent upon either the prerogative right to declare sovereignty or upon 'the vagaries and uncertainties of international law'. On the relevance of the Act of 1878 his lordship asked the pertinent question: 'Why should one assume that, if there had been a definition in the Act of 1949, it would have accorded with the first part rather than the second part of the definition in section 7 of the Act of 1878?' It followed from his premises that the Order in Council of 1964 was irrelevant to the application of the Act of 1949. The concern with certainty in the law shown by Salmon L.J. can only be admired but the particular type of uncertainty can hardly be avoided by adopting a particular construction, since the ultimate source of difficulty lies in the relations of the prerogative power and Parliamentary legislation and also of municipal and international law. Then one gets an effect of lamination of rules which is familiar in private international law. In several passages Salmon L.J. indicates distaste for the uncertainty of rules of international law which, with respect, may rest on assumption rather than inquiry. *Regina* v. *Keyn* and the instant case exhibit uncertainties in English law at least as much as in international law. Moreover, English criminal law has always accommodated substantial areas of uncertainty, including in recent years the *mens rea* of murder, the question of strict liability in statutory offences, conspiracy to corrupt public morals and conspiracy to trespass.

Territorial sea—baselines—bays and low-tide elevations. Municipal law—relation to international convention

Case No. 3. Post Office v. *Estuary Radio, Ltd.*, [1967] 1 W.L.R. 1396, C.A. This case concerns the same transmitting operation as the case previously noted and provides a sequel. After the failure of the applications in those proceedings Estuary Radio, Ltd., began broadcasting again at the end of 1966 after making certain surveys. The Company was convicted subsequently by the Rochford Justices of contravention of Section 1 (1) of the Wireless Telegraphy Act of 1949 on the basis that Red Sands Tower was in internal waters, but the Company continued to broadcast. The plaintiff in the present proceedings, the Post Office, claimed an injunction, under Section 14 (7) of the Act of 1949, to restrain the Company from using apparatus for wireless telegraphy at Red Sands Tower in the estuary of the River Thames in the United Kingdom or the territorial waters adjacent thereto except under the authority of a licence. The defendant denied that the tower was part of the United Kingdom, as contended on behalf of the plaintiff, or that it was within internal or territorial waters and counterclaimed for declarations (*a*) that the tower was not in United Kingdom internal or territorial waters but was on the high seas and (*b*) that the user of it without a licence was lawful. O'Connor J. held[1] that the tower was in the internal waters of the United Kingdom and, alternatively, that it was in the territorial waters adjacent thereto and granted the injunction asked for.

The appeal against the decision of O'Connor J. was dismissed. Diplock L.J. delivered the judgment of the court. As a preliminary issue the court considered whether, as the appellants contended, the Divisional Court had erred in their decision in *Regina* v. *Kent Justices, Ex parte Lye* that the Wireless Telegraphy Act applied to areas claimed subsequently by the Crown as the internal waters and territorial sea of

[1] [1967] 1 W.L.R. 847.

the United Kingdom, in particular by the Territorial Waters Order in Council, 1964. The Court of Appeal approved the view of the Divisional Court and remarked:[1]

> The area comprised within the United Kingdom and its territorial waters varies in any event from time to time by natural processes as parts of the coastline change by erosion or accretion. . . . The area to which an Act of Parliament . . . applies may vary too as the Crown, in the exercise of its prerogative, extends its claim to areas adjacent to the coast of the United Kingdom in which it did not previously assert its sovereignty.

The question which remained was to decide how the baseline provision in the Order in Council of 1964 should apply to Red Sands Tower. The Post Office claimed that the Thames estuary constituted a bay and the tower lay on the landward side of the closing line of the bay. In construing the Order in Council the Court found it convenient to look first at the Convention on the Territorial Sea and Contiguous Zone, *inter alia*, because the Order in Council was promulgated to give effect to the Convention. The judgment then sets out the provisions of Article 7 (2) of the Convention:

> For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semicircle whose diameter is a line drawn across the mouth of that indentation.

The same article, in paragraph 3, provides that the closing line for the purpose of measurement is the line 'joining the low-water marks of its natural entrance points'.

The court then pointed out[2] that the Convention, which constituted a declaration by the Crown of an extension of territorial sovereignty, had been followed by another declaration by the Crown in the form of an Order in Council which 'since it is later in date, is the document by which we are bound and which we have to construe'. The Crown had the right to change its policy even if this involved breaking an international convention. The judgment continues:

> But there is a presumption that the Crown did not intend to break an international treaty (see *Salomon* v. *Commissioners of Customs and Excise*[3]), and if there is any ambiguity in the Order in Council, it should be resolved so as to accord with the provisions of the Convention in so far as that is a plausible meaning of the express words of the order. Furthermore, the fact that the Order in Council uses different words from the Convention does not of itself give rise to any inference that a different meaning was intended. International conventions, which are intended to be given effect by States with differing systems of municipal law, do not employ the terms of art of the municipal law of any single country, but seek to express, usually at greater length than would be needed if the terms of act of the municipal law of any one country were used, a general concept which can be translated into the terms of act of the municipal law of each country which becomes a party to the Convention.

The Court then cited the relevant parts of the Order in Council and concluded that there was no conflict between these and the corresponding provisions of the Convention. However, both the Order in Council and the Convention used the expression 'the natural entrance points' of an indentation. The Post Office contended that the test was purely cartographical: 'it requires one to look at the low-water line as delineated on the chart round and adjacent to the indentation and to see if there can be found two points on opposite sides of the indentation at which the direction of the coastline

[1] [1967] 1 W.L.R. 1396, C.A., at 1401. [2] Ibid., at 1404. [3] See case No. 1, above.

changes sufficiently abruptly as to be identifiable as the points at which the indentation begins'.[1] The respondents argued that the test was not purely cartographical and visual, but involved consideration of other factors, including the geology of the coastal area, the tide streams, and navigational considerations such as the position of lights and shoals. Both sides called experts to support their contentions. The Court of Appeal noted with approval the preference of the trial judge for the evidence of the Post Office experts who were Naval officers 'whose duty it was to advise the Crown not only upon its own claims to internal waters and the territorial sea, but upon the recognition of claims by other States'. On the merits of the two tests the court observed:[2]

> . . . the Post Office experts gave convincing reasons for applying the purely cartographical test, which, according to their evidence, is that adopted by the United Kingdom and other countries in applying the Convention. The purpose of the Convention is to enable the citizens of all countries, parties to the Convention, to ascertain what are the boundaries of the internal and territorial waters of other States, so that they may know the areas in which they may fish or exercise their rights of innocent passage. The only simple and convenient way in which they can do this is by visual inspection and measurement of the officially recognized charts of the claimant State'.[3]

The court then dealt with the issue of substance:[4]

> Applying the cartographical test, the Post Office experts identified the Naze as the northern and Foreness as the southern 'natural entrance points' to an indentation of the coast leading to the mouth of the Thames. The evidence of Estuary Radio's experts, being based upon the wider concept of natural entrance points, was mainly directed to establishing that the 'estuary of the Thames' commenced seaward of the Naze and Foreness, and that its natural entrance points were Orfordness and North Foreland. Upon their calculations of the area landward of a line from Orfordness to the North Foreland, the Thames Estuary was not a 'bay' within the definition in the Order in Council. This may or may not be so, but the relevant problem is not to delineate the estuary of the Thames but to determine whether there is any indentation of the coast leading to the mouth of the Thames which has the defined characteristics of a 'bay'; and if there is, it matters not whether the 'bay' comprises the whole of the 'estuary of the Thames' or only part of it. . . . We agree with [the decision of the trial judge] that the Naze and Foreness are 'natural entrance points' of an indentation of the coast.

It followed that the twenty-four-mile baseline enclosed on its landward side the Red Sands Tower which was thus in internal waters. The court referred to but refused to rule upon two questions of construction raised in the course of argument. Thus if Orfordness instead of the Naze were the northern entrance point and Foreness were the southern, the indentation would be a 'bay' only if the words 'low-water line around the shore of the indentation' of the coast, in the Order in Council and the Convention, included the low-water line up the Thames as far as Richmond lock and up the subsidiary rivers of the estuary as far as the waters of those rivers rise and fall with the tide. Estuary Radio contended that it excluded the low-water line along the banks of the rivers landward of their mouths. This issue is not at all easy to resolve by reference to the *travaux préparatoires* of the Convention and there seems to be little reported international practice on the point. A further point of construction was whether a 'low-tide elevation' must be above water at all low tides, at mean low-water spring tides, at Admiralty datum, at the lowest tides experienced from time to time (and if

[1] [1967] 1 W.L.R. 1396, C.A., at 1405.
[2] Ibid.
[3] The court referred in this connection to Articles 3 and 4 (6) of the Convention.
[4] Ibid., at 1406.

so, how often?) in the course of a year, or at lowest astronomical tides. There is no evidence that the International Law Commission foresaw these problems when discussing the use of low-tide elevations for constructing baselines. Moreover, these features are a source of uncertainty in other ways: thus a State facing claims to use of elevations may find it difficult to check the existence or character of the elevations marked on official charts of the claimant State. External checks by aerial photography are apparently not very reliable.

IAN BROWNLIE

B. PRIVATE INTERNATIONAL LAW*

Contractual choice of forum and choice of law

Case No. 1. In Mackender v. *Feldia A.G.*[1] by a contract made in London the plaintiffs, Lloyd's underwriters, issued a jewellers' block insurance policy covering the defendants, who were foreign diamond merchants, against loss or damage to their stock anywhere in the world. The policy contained a foreign jurisdiction clause providing that it should be governed exclusively by Belgian law and that any disputes thereunder should be 'exclusively subject to Belgian jurisdiction'. The defendants made a claim on the plaintiffs in respect of a loss occurring in Italy. The plaintiffs rejected the claim alleging that the defendants had made a practice of smuggling diamonds into Italy. The defendants commenced proceedings in Belgium claiming their loss of £48,266, but the plaintiffs, wishing the dispute to be tried in England, issued a writ in England asking that the policy be declared void for illegality (it being contrary to English law to insure goods intended to be smuggled into a friendly foreign country) and voidable for non-disclosure by the defendants of their smuggling practices, and that the policy be rescinded or annulled. The trial judge granted leave to the plaintiffs to serve the writ on the defendants out of the jurisdiction under R.S.C. Ord. 11, r. 1 (1)(*f*). As the contract was made in England it was not disputed that he had the discretionary power to do so. The Court of Appeal (Denning M.R., Diplock and Russell L.JJ.) held, however, that the grant of leave was a mistaken exercise of the trial judge's discretion. The Court found that the dispute was within the foreign jurisdiction clause and that, as the plaintiffs had agreed to this clause, it would be unreasonable to allow them to invoke the jurisdiction of the English courts. The need for great caution in exercising the discretion bestowed by the Order to grant leave to serve an absent defendant was emphasized: 'The jurisdiction which the High Court claims over defendants, who are neither present nor ordinarily resident in this country, when it grants leave under R.S.C. Ord. 11, is wider than any corresponding jurisdiction which it recognises as possessed by a foreign court over defendants who are not present or ordinarily resident in the foreign state. And because it is a claim which conflicts with the general principles of comity between civilised nations, it is one which should be exercised with caution.'[2] Although the contract had been made in England and although one of the parties was English, the Court of Appeal was prepared to go to the length of reversing an exercise of discretion by the trial judge in order to hold that leave should not be granted to serve the absent defendant.

Perhaps the main importance of *Mackender* v. *Feldia A.G.* as a contribution to the jurisprudence of private international law lies in the reasoning and associated dicta which led the court to hold that the issues of illegality and voidability which the plaintiffs sought to raise were within the foreign jurisdiction clause.

* © P.B. Carter, 1968. [1] [1967] 2 Q.B. 590. [2] Ibid., p. 599, *per* Diplock L.J.

Lord Denning M.R. said: 'I can well see that if the issue was whether there ever had been any contract at all, as, for instance, if there was a plea of *non est factum*, then the foreign jurisdiction clause might not apply at all.'[1] In the instant case, however, the issue was not as to voidness but as to voidability and/or illegality. Non-disclosure does not automatically render a contract void *ab initio*, and illegality by the *lex fori* merely renders it unenforceable in an English forum. In these circumstances, a contract had been formed, and, as that contract contained a foreign jurisdiction clause and as its proper law was Belgian, the issues could most usefully and properly be determined by Belgian courts. This decision is, it is respectfully submitted, clearly right. The judgments of their Lordships, however, provoke further reflections.

1. It is submitted with respect that, even if the issue had been as to the original validity of the contract, it would have fallen to be determined by Belgian law as the putative proper law. The proper law of a contract determines matters of (form apart) its validity. This law must, therefore, determine whether or not a contract has been formed, for formation connotes formation of a *valid* contract. The limitation upon the prospective scope of the proper law is at the level of characterization. It is by this weapon that the *forum* retains ultimate control: there comes a point at which, although the putative proper law may deem a valid contract to have been formed, the English courts will decline to characterize the fact situation as giving rise to a problem of contract at all. It would, however, be insular indeed to adjudge this point to have been reached whenever there would be no contract according to the criteria of English domestic law. Such is not the practice of the English courts. In *Re Bonacina*,[2] for example, a contract the putative proper law of which was Italian was held to have been validly formed although unsupported by consideration.

2. Diplock L.J. said: 'English courts will not enforce an agreement, whatever be its proper law, if it is contrary to English law, whether statute law or common law.'[3] It is submitted with respect that refusal on this score to enforce a contract, valid and lawful by its proper law, is not general. So far as contravention of an English statute is concerned the applicability or otherwise of the statute to foreign contracts must depend upon the true construction of the particular statute in question. Contravention of the common law constitutes a justifiable bar to enforcement only if the rule is procedural or issues of overriding public policy are involved.

3. Another dictum[4] of Diplock L.J. provides uncompromising support for the view that a contract, although valid and lawful by its proper law, will be unenforceable in England to the extent that performance of the contract would involve illegality by the *lex loci solutionis*.[5] The assertion in *Dicey and Morris*[6] that such a contract is to this extent not only unenforceable but also invalid is tacitly rejected.

4. On the method of determining the proper law of a contract the learned Lord Justice said: 'The *prima facie* rule of English conflict of laws—more liberal in this respect than many continental systems—is that the proper law of a contract is that system of law which the parties themselves have agreed shall regulate the legally enforceable rights and duties to which their agreement gives rise.'[7]—Those who take the view that the proper law is subjectively determined will welcome the general tenor of this dictum. The objectivists will focus upon the qualification implicit in the words 'prima facie'. The precise nature of this qualification may prove to be almost as elusive

[1] Ibid., p. 598. [2] [1912] 2 Ch. 394. [3] Ibid., p. 601. [4] Ibid.

[5] For a powerfully argued contrary view see F. A. Mann, this *Year Book*, 18 (1937), pp. 107–13.

[6] Dicey and Morris, *The Conflict of Laws* (8th ed., 1967), Rule 132, Exception.

[7] [1967] 2 Q.B. 590, 602.

as that made by Lord Wright in *Vita Foods Products Inc.* v. *Unus Shipping Co. Ltd.*,[1] itself the high-water mark of subjectivism, when he required that the parties' choice be 'bona fide and legal'.

Foreign legislation and polygamous marriages

Case No. 2. The recent Probate Division decision in *Parkasho* v. *Singh*[2] has significance in two areas of private international law. It adds to the case law on the distinction between monogamous and polygamous marriages. It also deals with two points concerning the way in which foreign law may be proved in English courts.

The parties, Sikhs, had entered into a valid potentially polygamous marriage in India in 1942. In 1955 the husband came to live in England, and his wife and child joined him in 1963. In 1965 the wife instituted proceedings before English magistrates complaining that the husband had been guilty of wilful neglect to maintain herself and the child of the marriage. The husband successfully took the point that the marriage was a potentially polygamous one and that therefore the Court lacked jurisdiction under the rule in *Hyde* v. *Hyde*,[3] as applied by the Court of Appeal in *Sowa* v. *Sowa*.[4] However, the Probate Division of the High Court remitted the case for the magistrates to hear, holding that, although polygamous at its inception, the marriage had been rendered monogamous by the Indian Hindu Marriage Act of 1955.

It is now well established that the nature of a marriage may change at least for the purposes of the rule in *Hyde* v. *Hyde* and of succession to titles of honour. Cairns J., who delivered the leading judgment in *Parkasho* v. *Singh*, cited *Cheni* v. *Cheni*,[5] *Ali* v. *Ali*,[6] and the *Sinha Peerage Claim*[7] in this connection. It is also well established that the relevant time at which to judge the nature of a marriage, at least for the purposes of the rule in *Hyde* v. *Hyde*, is the time of the proceedings. The question which is still open is as to the circumstances which will be recognized as giving rise to mutation. In *Cheni* v. *Cheni* Sir Jocelyn Simon P. recognized a change from polygamy to monogamy upon the birth of a child: it is to be noted, however, that this change was in accord with, and indeed pursuant to, the provisions of the *lex loci celebrationis*, the law governing the nature of the marriage at its inception. The mutation recognized in the *Sinha Peerage Claim* was brought about by a change of religious sect on the part of the parties to the marriage;—here, too, the change accorded with the *lex loci celebrationis*. In *Ali* v. *Ali*, however, the acquisition of a domicil in a monogamous country was held *per se* to change the nature of the marriage and to throw off the control of the *lex loci celebrationis*. In *Parkasho* v. *Singh* the mutation which was recognized resulted from a change in the *lex loci celebrationis*. The possibility of change by legislative action had been foreshadowed *obiter* by Simon P. in *Cheni* v. *Cheni*.[8] The learned President, with whom Cairns J. was sitting in *Parkasho* v. *Singh*, referring back to his judgment in *Cheni* v. *Cheni*, said: 'After all, in *Cheni* (*orse. Rodriguez*) v. *Cheni* the change in the character of the marriage was brought about by operation of law: Egyptian law [*lex loci celebrationis*] referred the matter to the religious law of the parties; the religious law of the parties stipulated that a potentially polygamous marriage should become monogamous for all purposes by the birth of a child. That

[1] [1939] A.C. 277. [2] [1967] 2 W.L.R. 946. [3] (1886), L.R. 1 P. and M. 130.
[4] [1961] P. 70. [5] [1965] P. 85. [6] [1966] 2 W.L.R. 620.
[7] [1946] 1 All E.R. 348n. The learned judge also cited *Ohochuku* v. *Ohochuku*, [1960] 1 W.L.R. 183, as a case of mutation. He did so with hesitation and, it is submitted, wrongly: see this *Year Book*, 41 (1965–1966), p. 443.
[8] [1956] P. 85, 98.

was on ultimate analysis a provision of Egyptian law; and being a provision of Egyptian law, it could unquestionably be altered—or, indeed, have been originally enacted—by Egyptian legislation.'[1] The principle is that just as the *lex loci celebrationis* determines the nature of the marriage at its outset, so, too (as in *Cheni* v. *Cheni* and in the *Sinha Peerage Claim*) that law determines what events will cause a mutation, and so, too (as in *Parkasho* v. *Singh*), changes in the *lex loci celebrationis* itself may alter the nature of the marriage. The case which stands alone and inconsistent with the logic of the control of the *lex loci celebrationis* is *Ali* v. *Ali*.[2] In *Parkasho* v. *Singh* the dominance of the *lex loci celebrationis* was so far accepted as to give effect to changes in it, which changes could not have been foreseen by the parties at the time of the marriage. In this context Cairns J. referred to the decision of the House of Lords in *Starkowski* v. *Attorney-General*[3] in which a marriage was held to be validated by a subsequent change in the law of the place of celebration even though the parties could not have contemplated at the time of the ceremony that the legislation would occur. Simon P. said: 'I agree with Cairns J. that *Starkowski* v. *Attorney-General* is relevant here. What greater change can be effected in the character of a marriage than from void to valid? If legislation can be recognised as retroactively changing the character of a union from void to valid marriage, I can see no reason at all why legislation may not be recognised as at least prospectively changing the character of a marriage from potentially polygamous to monogamous.'[4]

Foreign law, unlike English law, is not judicially noticed but must be proved as a fact. Its determination is, therefore, to be based upon the evidence before the court. This is the dogma but it is not the whole truth. Although a question of fact it constitutes one of the exceptions to the principle that such questions are for determination by the jury. A question arose in *Parkasho* v. *Singh* as to the effect of the Indian Hindu Marriage Act, 1955. Expert witnesses were called by both sides before the magistrates. They disagreed as to the effect of the statute upon the marriage, but the magistrates decided that it was polygamous at its inception and that its character had not been changed by the Act. The Divisional Court accepted the logic of the rule that matters of foreign law, although classified as fact, are decided by the judge and held that it is the duty of an appellate court to examine the evidence of foreign law which was before the magistrates at the trial and to decide for itself whether or not it justified the conclusion to which the magistrates came.

The Court further held that in the circumstances of the instant case it was entitled itself to consider the actual words of the foreign statute. Cairns J. cited Lord Wright in *Lazard Bros. and Co.* v. *Midland Bank Ltd.*: '"The text of the foreign law"—and this is an important sentence—"if put in evidence by the experts may be considered, if at all, only as part of the evidence and as a help to decide between conflicting expert testimony."'[5] The learned judge also cited the rather looser language of Lord Langdale M.R. in *Nelson* v. *Bridport*: 'If the utmost strictness were required in every case, justice might often have to stand still; and I am not disposed to say that there may not be cases, in which a judge may, without impropriety, take upon himself to construe the words of a foreign law, and determine their application in the case in question, especially if there should be a variance or want of clearness in the testimony.'[6]

[1] [1967] 2 W.L.R. 946, 961.
[2] [1966] 2 W.L.R. 620. For a criticism of this first instance decision see this *Year Book*, 41 (1965–1966), pp. 442–4.
[3] [1954] A.C. 155.
[4] [1967] 2 W.L.R. 946, 961.
[5] [1933] A.C. 289, 297–8, cited by Cairns J. at pp. 958–9.
[6] (1845), 8 Beav. 527, cited at p. 959.

Simon P., the other member of the court in *Parkasho* v. *Singh*, said 'Specifically, where there is a conflict of expert evidence as to foreign law, the court may itself look at the written material of the foreign law in order to arrive at its determination.'[1]

It would seem clear that the court can only look at materials which have been put in as evidence. This was emphasized by Lord Wright and is clearly correct in principle, although Lord Langdale's dictum contains no mention of the qualification. What is less clear is whether there must have been, as there was in *Parkasho* v. *Singh*, a conflict of expert testimony. It may well be that a court in practice would seldom be disposed to reject the uncontradicted evidence of experts, but it is free to do so and, it is submitted, it ought by the same token to be free to attach what weight it thinks fit to written materials put in evidence.

Divorce jurisdiction

Case No. 3. The place in which adultery was allegedly committed and the domicile of the parties at that time are factors which have no direct significance in the English private international law of divorce. In the Scots case of *Clark* v. *Clark*,[2] however, it was held that a Scots court could properly take jurisdiction in divorce proceedings where the husband, although domiciled outside Scotland at the time of the proceedings, had been domiciled in Scotland at the time of the alleged adultery which had taken place in Scotland. It would seem that this is based upon a misapprehension as to the primary purpose of divorce proceedings, which is not to punish, or to compensate, but to effect a change in the status of the parties at the time of the proceedings. It is for this reason that the personal law at that time should control. Reference to the place of the adultery savours of a misconceived analogy taken from the private international law of tort. The relevance of domicile at that moment in what at the time of the proceedings is past history is not self-evident.

The decision in *Clark* v. *Clark* provokes several further queries. Does the rule apply if not the wife but the husband is the petitioner? Does the rule extend to all matrimonial offences or is it confined to cases of adultery? Does the principle apply in the converse case? Will a Scots court decline jurisdiction if, although the parties are domiciled in Scotland at the time of the proceedings, they were domiciled elsewhere at the time of the alleged adultery and/or the alleged adultery took place outside Scotland?

Recognition of foreign divorces

Cases Nos. 4–8. Few would question that the decision of the House of Lords in *Indyka* v. *Indyka*[3] will for better or for worse prove to be a landmark in the history of English private international law. The stream of authority of which it will be the source is already rising: *Angelo* v. *Angelo*,[4] *Peters* v. *Peters*,[5] *Tijanic* v. *Tijanic*[6] and *Brown* v. *Brown*.[7] *Indyka* v. *Indyka*, itself, will compel reassessment of the role of the House as the supreme tribunal in the United Kingdom. The present commentary is, however, concerned only with the effect of the case upon the private international law of divorce.

The facts which gave rise to the decision were as follows. A wife, who had always resided in Czechoslovakia but whose Czech-born husband had acquired a domicile

[1] [1967] 2 W.L.R. 946, 961.
[2] [1967] S.L.T. 319.
[3] [1967] 3 W.L.R. 510.
[4] [1968] 1 W.L.R. 401.
[5] [1967] 3 W.L.R. 1235.
[6] [1968] P. 181.
[7] [1968] 2 W.L.R. 969.

of choice in England after the Second World War, was granted a decree of divorce by a court in Czechoslovakia which became final in February 1949. In 1959 the husband married his second wife in England. In 1964 in divorce proceedings brought by the second wife the husband contended that the Czechoslovakian decree was not valid in England and that, therefore, being still married to his first wife, he had never lawfully married his second wife. On the issue of the validity of the second marriage, having regard to the fact that the English courts first assumed jurisdiction to grant divorces to wives domiciled abroad but resident in England (by the Law Reform (Miscellaneous Provisions) Act, 1949) in December 1949, Latey J. held that the Act of 1949 and the reflected change in the law relating to the recognition of foreign decrees became effective in December 1949, prospectively, not retrospectively, so that the Czechoslovakian decree pronounced in February 1949 could not be recognized as valid in England. The Court of Appeal by a majority reversed the trial judge on this point. The husband then appealed to the House of Lords. The House affirmed the decision of the Court of Appeal, holding that the Czech divorce was entitled to recognition in England and that the husband's second marriage was a valid marriage. Three of the five Lords, Lord Morris, Lord Pearce and Lord Pearson were willing to approve the liberal interpretation of the rule in *Travers* v. *Holley*[1] placed upon it by the Court of Appeal.

The dramatic interest of *Indyka* v. *Indyka* lies in the fact that the House of Lords announced hitherto unknown grounds for the recognition of foreign divorces, grounds quite independent of the domicile test laid down in *Le Mesurier* v. *Le Mesurier*,[2] its extension in *Armitage* v. *A.G.*,[3] and the rule in *Travers* v. *Holley*. Unhappily, their Lordships did not by any means speak with one voice as to the exact nature of these new jurisdictional bases. It is, with respect, singularly unfortunate that when the supreme tribunal in effect assumes the role of the legislator it should not also adopt some of the essential techniques of the legislative process, most particularly a striving after clarity and precision. It is at least possible to say with some degree of certainty that a foreign divorce decree will now be recognized if pronounced by the court of a country of which at the time both parties were nationals and with which at that time they had a real and substantial connection. That one can say this is due to the fact that it is supported by at least a majority of their Lordships—Lord Morris, Lord Pearson, Lord Pearce and perhaps Lord Wilberforce. It is palpably new law. It is couched in somewhat vague terms, but the element of flexibility which this imports is probably desirable. The type of uncertainty which is to be regretted is rather that which stems from the fact that several additional bases for recognition are mentioned by various of their Lordships but apparently none commands the support of a majority. Lord Reid, for instance, took the view that the divorce ought to be recognized because the first wife, to whom it was granted, had had her matrimonial home in Czechoslovakia and had continued to reside there after her husband had left. Lord Wilberforce would relax the three-year residence qualification to the advantage of wives: he would 'recognise divorces given to wives by the courts of their residence whenever a real and substantial connection is shown between the petitioner and the country, or territory, exercising jurisdiction':[4] residence for as long as three years is not essential, nor is nationality, which is merely a factor 'which may reinforce the connection'. Lord Pearce, on the other hand, would apparently in certain cases accept nationality *per se* as a connection sufficient to justify recognition, provided jurisdiction had in fact been assumed by the foreign court on that basis.

[1] [1953] P. 246. [2] [1895] A.C. 517. [3] [1906] P. 135. [4] [1967] 3 W.L.R. 510, 558.

The rigidity and the absurdities of the English concept of domicile, the archaic dogma that the wife's domicile is that of her husband, and the piecemeal nature of the statutory mitigation of the deficiencies of the English jurisdiction rule, mirrored as they are by the *Travers* v. *Holley* doctrine in the field of recognition, all combine to encourage a sympathetic attitude to any widening of the bases of recognition of foreign divorces. One cannot, however, resist the reflection that the position would undoubtedly be more simple, more certain and, for this and other reasons, probably more just, if the law of domicile were reformed so as to reflect more accurately a present and seemingly reasonably settled intimacy of connection between a person and a law district and if the domicile of a wife were determined in the same way as that of any other sane adult human being. In such circumstances domicile would be adequate to perform its historic role of determining the personal law and could alone ground the divorce jurisdiction both of the English *forum* and of foreign courts for the purposes of recognition in England.

The decision in *Indyka* v. *Indyka* apparently in no way restricts the previous law relating to recognition. The new ground or grounds are cumulative. It will no doubt be some time before the law fully re-crystallizes. Four post-*Indyka* cases at first instance provide some indication of the form which it will take.

In *Angelo* v. *Angelo*[1] the marriage had taken place in England in 1960. The husband was a British subject domiciled throughout in England. The wife was a German national who, of course, acquired her husband's English domicile. In 1962, whilst the parties were living in France where the husband was working, the wife left him and returned to Germany with their child. In 1963 she obtained a divorce in Germany. Ormrod J., recognizing this decree, said, 'In this case, the wife is a German national and she is clearly habitually resident within the jurisdiction of the German court granting the decree. In those circumstances, she seems to me clearly to fall within the test proposed by all their lordships in *Indyka*'s case.'[2] His Lordship seems to be relying upon the fact that the petitioner in the foreign proceedings was a local national and that she had a 'real and substantial connection' with that country at the time of those proceedings. It is to be noted that there had never been a bond of nationality or of 'real and substantial connection' between the respondent and the foreign court. It is to be noted, too, that there had never been a matrimonial home in Germany. In these respects the facts differ from those in *Indyka* v. *Indyka*. It is also to be noted that the 'real and substantial connection' between the petitioner herself and the German forum had been acquired, or rather reacquired, only about six months before she obtained the divorce there. In this last respect at least, future cases may show that *Angelo* v. *Angelo* went to the limit even of the new law.

Angelo v. *Angelo* was, in all significant respects, in effect followed by Cumming Bruce J. in *Brown* v. *Brown*,[3] although it would seem that in the latter case the real and substantial connection between the petitioner and the foreign *forum* was more apparent. The husband was a British subject domiciled in England throughout, who married his wife, a Swedish national domiciled in Sweden in 1957. The marriage took place in Sweden. The couple thereafter lived in Holland and in Switzerland, but in 1963 the wife returned to Sweden with her children. In 1964 she obtained a decree of judicial separation and in 1966 a divorce, both in Sweden. Cumming Bruce J. recognized the Swedish divorce decree on dual grounds: first under the rule in *Travers* v. *Holley*,[4] the wife having been resident in Sweden for more than three years immediately prior to the proceedings, and secondly, following *Indyka* v. *Indyka*, because 'it has been

[1] [1968] 1 W.L.R. 401. [2] Ibid., p. 406. [3] [1968] 2 W.L.R. 969. [4] [1953] P. 246.

shown that the wife, by the date of her petition for divorce in Sweden, had a real and substantial connection between herself and that country, and that that connection has persisted ever since'.[1] In *Brown* v. *Brown* Cumming-Bruce J. did not refer specifically to the nationality of the petitioner: perhaps this is no more than a factor, albeit an important one, to be taken into account in assessing the existence or otherwise of a real and substantial connection. The significance of the learned judge's reference to the persistence of the connection since the decree is not altogether clear. The fact that it has persisted may be evidence of the genuineness of the connection, but to require persistence as such would seem to be unwarranted. The jurisdictional competence of a foreign court is measured by reference to the situation as it existed at the time of the assumption of jurisdiction.

In *Tijanic* v. *Tijanic*[2] Simon P. recognized a Yugoslav divorce by virtue of the doctrine of *Travers* v. *Holley*, although the learned President did indicate by way of *obiter dictum*[3] that recognition might have been accorded under the *Indyka* principle. On the facts as reported there would seem to be a strong case for this. The parties, both Yugoslavs, had married in Yugoslavia in 1934. After serving in the Yugoslav and British forces, the husband settled in England in 1948, acquired a domicile of choice here, and in 1954 became a British subject. The wife refused to join him and she remained in Yugoslavia throughout. A divorce decree was pronounced in Yugoslavia in 1961.

A case to be contrasted with *Angelo* v. *Angelo* and *Brown* v. *Brown* is *Peters* v. *Peters*.[4] There the parties, then both Yugoslav nationals domiciled in Yugoslavia, were married in Yugoslavia in 1946. A year later they came to England where they became naturalized. The husband acquired a domicile of choice and they changed their name to Peters. In 1960 the husband left the matrimonial home and thereafter made frequent visits to Yugoslavia. Pursuant to an arrangement with him the wife visited Belgrade in 1962 and obtained a decree of divorce there, the court assuming jurisdiction because the marriage had been celebrated in Yugoslavia. Both parties then returned to England. Wrangham J. refused to recognize the Yugoslav decree. The learned judge took the 'high water mark' of the *Indyka* principle to be 'the proposition that an English court will recognise the validity of a foreign decree whenever there is a real and substantial connection between the petitioner and the court exercising jurisdiction'.[5] The fact that the marriage had been celebrated in that jurisdiction was not enough to constitute such a connection even though at that time both parties were local nationals and domiciliaries. The focus of attention must be the relationship of the petitioner and the foreign court at the time of the commencement of the divorce proceedings.

One final point on *Indyka* v. *Indyka*. The decision is concerned with the recognition of foreign decrees and not with the jurisdiction of the English courts. This is the formal position, but it is perhaps unlikely that it will long remain the whole story. It is scarcely credible that the English courts will resist the converse of the *Travers* v. *Holley* philosophy and deny themselves jurisdiction in circumstances in which *mutatis mutandis* they would recognize its assumption by others.

Judicial separation

Case No. 9. Modern case law on the private international law of judicial separation is not voluminous. This form of matrimonial relief is the contemporary equivalent of proceedings for divorce *a mensa et thoro* which were entertained in the old ecclesiastical

[1] Ibid., 972. [2] [1968] P. 181. [3] Ibid., p. 1568.
[4] [1967] 3 W.L.R. 1235. [5] Ibid., p. 1238.

courts before the Matrimonial Causes Act, 1857. Section 22 of that Act (now replaced by the Supreme Court of Judicature (Consolidation) Act, 1925, Section 32) prescribed that the new civil courts should continue to proceed and give relief in accordance with the principles upon which the ecclesiastical courts had previously acted. The dominant jurisdictional consideration had been, and, therefore, should still be, the right of the respondent to protest the jurisdiction of any court other than the court of the diocese in which he resided. Since 1858, however, judicial separation has felt the backwash of developments in the main stream of private international law. Domicile has become generally entrenched as a test of the personal law, and a side product of this process has been the acceptance of the domicile of the parties in England at the time of the commencement of the proceedings as an alternative basis for jurisdiction.[1] The justification for this is far from clear as suits for judicial separation are not concerned with, and do not change, the status of the parties. A further alternative jurisdictional ground was introduced by the Matrimonial Causes Act, 1937, Section 13, and is now embodied in the Matrimonial Causes Act, 1965, Section 40 (1) (*a*). This piece of legislation was designed to mitigate the lot of the 'deserted wife', more particularly in divorce cases, and, again, the policy case for its application to judicial separation is not made out. The editors of *Dicey and Morris* state that the fact that the parties had a matrimonial home in England when the events occurred upon which the claim for separation is based is itself yet another ground for jurisdiction.[2] The Court of Appeal in *Sinclair* v. *Sinclair*[3] has, however, now rejected this particular contention. The wider significance of this recent decision is that it is indicative of a return to the doctrine of the dominance of the residence of the respondent, and the Court took the opportunity to explain the sophistication of this concept.

In *Sinclair* v. *Sinclair* the parties had married in England in 1945, the husband, a Pole, being then domiciled in England. In 1947 they had emigrated to Canada and later settled in the United States where their two children were born. For business reasons the family returned to England in 1964, where they took furnished accommodation at various places on short tenancies, and the husband resided with his family except when abroad on business. In 1965, again for business reasons, the husband went to the United States, visiting his family in England from time to time. In March 1966, while the husband was visiting his English home, an incident occurred which caused the wife to charge him with adultery. The parties ceased cohabitation, and the husband returned to the United States. On 1 August 1966 the wife petitioned for *inter alia* a decree of judicial separation on the grounds of cruelty, adultery and desertion. The husband was in the United States at the time, but he retained the tenancy of the house in England, where the wife and children at all material times continued to reside, and he left there a number of his belongings, including clothes and some of his business papers. In September 1966 he returned to the matrimonial home and sought, although unsuccessfully, to resume cohabitation: the wife obtained a court order requiring him to vacate the home. Ormrod J., on a preliminary issue to determine whether he had jurisdiction to hear the wife's suit for judicial separation, found that the husband had acquired a domicile of choice in the United States shortly after 1954 and had not reacquired an English domicile: there was no appeal from this finding. The learned judge further held that jurisdiction cannot as a matter of law be based on the ground that there was a matrimonial home in England at the time when the events relied upon by the petitioner occurred, and that, as the respondent was not in fact

[1] *Eustace* v. *Eustace*, [1924] P. 45.
[2] Dicey and Morris, *The Conflict of Laws* (8th ed., 1967) Rule 43 (3).
[3] [1968] P. 189.

resident in England at the time of the commencement of the suit, he must decline jurisdiction. The Court of Appeal (Willmer and Russell L.JJ. and Scarman J.) reversed the decision to the extent of holding that the husband was resident in England at the time of the institution of the proceedings and that the court accordingly had jurisdiction.

The Court of Appeal was unanimous in expressly holding that the existence of a matrimonial home in England when the events occurred upon which the claim for separation is based does not *per se* found jurisdiction. *Ward* v. *Ward*,[1] an authority relied upon in *Dicey and Morris* for the contention to the contrary,[2] is explained on the grounds that there the respondent husband was domiciled in England, and that jurisdiction would today, following *Eustace* v. *Eustace*,[3] be based upon that ground. The Northern Irish case of *Wells* v. *Wells*,[4] also relied upon by *Dicey and Morris*, is mentioned but not explained by Scarman J. It cannot now be regarded as reflecting English law. Quite apart from authority, so far as policy is concerned it is only necessary to consider the length of time which may elapse between the occurrence of the events upon which the suit is based and the suit itself, to appreciate the inappropriateness of reference to connection with England at the former time as a basis for the assumption of jurisdiction.[5] This is so whether the connection be the existence of a matrimonial home or some other factor, such as the domicile of the parties or the residence of the respondent. The proper subject for inquiry is as to the existence *at the time of the proceedings* of factors adequate to justify adjudication by an English court.

Probably the most interesting and thought-provoking feature of *Sinclair* v. *Sinclair* is provided by the light which it throws upon the meaning of the traditional jurisdictional test couched in terms of the respondent's residence.

Scarman J., having quoted words used by Lord Reid in *Ross-Smith* v. *Ross-Smith*[6] when discussing the matrimonial jurisdiction of the ecclesiastical courts, emphasized that residence was, and, therefore, properly still is, an 'elastic' notion.[7] Willmer L.J. accepted that 'the question of residence depends partly on the factual state of affairs and partly on intention'.[8] Russell L.J. said: 'For this purpose, however, residence is not a simple question of bodily presence. Bodily presence at the critical date may not involve residence. Equally, bodily absence is not inconsistent with residence.'[9] Indeed the actual decision in the *Sinclair* case was that the respondent husband, although physically in the United States at the time, was resident in England when his wife instituted proceedings here. Physical presence is some evidence of residence, but it is not conclusive, particularly if it can be shown to be casual or transient. Conversely, physical absence is not inconsistent with residence if, in the words of Scarman J., 'the link between the respondent and the jurisdiction was sufficiently close to justify the exercise of jurisdiction'.[10] The width and generality of the inquiry is emphasized: 'In my opinion, therefore, though the jurisdiction is correctly described in terms of residence at the commencement of the proceedings, the court must take account of the respondent's whole situation, matrimonial as well as personal, in determining whether he was resident within the jurisdiction at that time. The matrimonial home, the last place of cohabitation, the events leading up to the suit and events occurring

[1] (1923) 39 T.L.R. 440.
[2] Now revised in the *First Supplement* (1968) to Dicey and Morris, *The Conflict of Laws*, (8th ed., 1967).
[3] [1924] P. 45.
[4] [1960] N.I. 122.
[5] See a hypothetical case put by Willmer L.J. at p. 217.
[6] [1963] A.C. 280, 298.
[7] At p. 228.
[8] At p. 221.
[9] At p. 222.
[10] At p. 228.

after, his personal movements, location and way of life, the situation of wife and children—all are facts to which the court will have regard. Residence in this context is not merely a personal, or property, presence, with some degree of permanence, but a state of affairs which connects a man and his family sufficiently clearly with England to make it just that the court should intervene.'[1] It is to be noted that it is in this broad context that the existence or non-existence of a matrimonial home in England at the time of the acts complained of may be entitled to some weight.

Sinclair v. *Sinclair* has brought back into focus the importance, when seeking justification for jurisdiction, of concentration upon the state of affairs prevailing at the time of the suit, and it has rehabilitated the flexibility of the notion of residence in this context. All this is to be welcomed; so, too, is the consequential rejection of the existence of a matrimonial home in England when the events complained of occurred as itself being a ground for jurisdiction. Perhaps the Court of Appeal's decision has rendered the time ripe for a reconsideration of the appropriateness of other jurisdictional bases for suits for judicial separation.

Section 40 (1) (*a*) of the Matrimonial Causes Act, 1965, referred to earlier in this note, gives the English court jurisdiction to entertain a petition by a wife if she has been deserted by her husband or he has been deported from the United Kingdom and he was immediately before the desertion or deportation domiciled in England. This legislation is designed to reduce the hardship which may result to a deserted wife from a combination of the rule that divorce jurisdiction is based exclusively upon domicile and the rule that a wife's domicile is tied to that of her husband. So far as judicial separation is concerned the same does not obtain. Jurisdiction is not exclusively or even primarily based upon domicile but upon the residence of the respondent, the determination of which may, as has been made clear in *Sinclair* v. *Sinclair*, take account of the position of his wife and family. There is, therefore, no special justification for reference to the domicile of the husband prior to the desertion or deportation; moreover, such reference is no more justifiable on general grounds than reference to the existence of a matrimonial home at the time of the events upon which a suit for judicial separation is based has been found to be. It is submitted that Section 40 (1) (*a*), as is the case with Section 40 (1) (*b*), ought to be inapplicable to suits for judicial separation.

It is established by authority[2] rather than by principle that domicile at the time of the suit is itself a ground for jurisdiction. A decree of judicial separation does not impinge upon status, the traditional preserve of the personal law. Parties may be domiciled in England in only the most technical sense, and there could certainly be cases in which it would be difficult to justify the assumption of jurisdiction in a matter like judicial separation which regulates the day-to-day behaviour of those concerned. If residence were narrowly and mechanically construed as involving always, and seldom more than, physical presence, it might have been plausibly contended on policy grounds that the residence of the respondent does not provide a sufficiently broad jurisdictional basis. But this notion of residence is a far cry from that propounded in *Sinclair* v. *Sinclair*. It is difficult to see that there can be many cases in which the assumption of jurisdiction is desirable, which would not be accommodated by the 'elasticity' of the rehabilitated concept of residence. To permit alternative reference to the parties' domicile is a complication which in this type of matrimonial proceeding is required neither by principle nor by policy and which could lead to the assumption of jurisdiction in some completely inappropriate cases.

[1] *per* Scarman J. at p. 232.

[2] *Eustace* v. *Eustace*, [1924] P. 45.

Adoption: the domicile of the child

Case No. 10. The recent decision in *In re B(S) (An infant)*[1] was concerned with an application by a married couple, domiciled and resident in England, to adopt the legitimate child of a Spanish father and an English mother. The father's domicile throughout was Spanish, although the mother's English domicile had apparently revived upon the dissolution of the marriage, after the birth of the child but before the instant proceedings. The child's domicile of origin was Spanish and Goff J. proceeded on the assumption that she had remained domiciled in Spain although custody of her had been awarded to the mother.

The learned judge held that, the proposed adopters being domiciled in England as required by Section 1 (1) of the Adoption Act, 1958, and the proposed adopters and the child being resident in England as required by Section 1 (5) of that Act, he had jurisdiction to make an order. The Act does not require that the child be domiciled here, and an order can be made here even though the courts of the infant's domicile could not make an order or could only make one having different consequences. On the other hand Goff J. rejected the contention canvassed in *Dicey and Morris*[2] that the foreign law can be disregarded altogether. His Lordship said: 'In my judgment, the true impact of the domiciliary law is purely as a factor—albeit an important one—to be taken into account in considering whether the proposed order will be for the welfare of the infant, a matter upon which the Statute expressly provides that the court must be satisfied before making an order: see Section 7 (1) (*b*) of the Act. . . . The court cannot shut its eyes to the possibility of creating the "limping infant" referred to in Cheshire's *Private International Law* (7th ed., 1965), p. 382, and if the child is domiciled in a country where the English order would not be recognised, he may "limp" not only there but in other places, and may find himself faced with a dispute in other countries whether the English order should be recognised or not.'[3] His Lordship continued: 'In my judgment therefore, where the child is or may be domiciled abroad or is a foreign national or was until recently ordinarily resident there, the court should consider whether its order will be recognised elsewhere unless the case is one in which it is clearly for the welfare of the infant that an order should be made irrespective of its consequences elsewhere, as in refugee cases: see, for example, *In re R. (Adoption)*.[4] With that exception, in my judgment in all cases where there is such a foreign element as I have described, evidence should be furnished to show that the order, if made, will be recognised by the foreign court and, if so, then the English court is free to proceed regardless of any question of foreign law or procedure, but if not, then the court will have to weigh the disadvantages of the child having one status here and another in other countries, or even a doubtful one, against the other considerations there may be in favour of adoption. The disadvantages may of course be serious in such matters as liability for military service, taxation (including death duties) and succession to property. It is not necessary, however, to prove what the child's domicile actually is, or to go into the adoption laws of the relevant foreign country, for in my judgment, as I have said, the problem is not one of jurisdiction or of applying the foreign law, substantive or procedural, but of considering factually whether, having regard to the foreign element, the English order will have general recognition, and if not whether the order would still be for the welfare of the infant.'[5]

The judgment has been quoted at such great length, because, it is submitted with great respect, it provides so lucid an exposition of the true role of the law of the infant's

[1] [1968] 1 Ch. 204.
[2] Dicey and Morris, *The Conflict of Laws* (8th ed., 1967), p. 458.
[3] Ibid., pp. 211–12.
[4] [1967] 1 W.L.R. 34.
[5] pp. 212–13.

domicile so far as the making of an English adoption order is concerned. In the instant case Goff J., being satisfied that the Spanish courts would recognize an English order and that such an order would be in the best interests of the child, assumed jurisdiction and made an order notwithstanding the fact that it involved dispensing with the father's consent.

The rejection of the view that the attitude of the courts of the child's domicile may be totally disregarded by an English court cuts away the basis of any suggestion[1] that by virtue of a doctrine of reciprocity a decision to recognize a foreign adoption may be taken without any consideration of the attitude of the courts of the child's domicile. Even if reciprocity is acceptable in this area of private international law, anything more than the crudest jurisdictional reciprocity would involve allowing the law of the child's domicile at least the same scope in the context of recognition of an adoption order made in a third country as it would be allowed in the context of English adoption proceedings. There is, moreover, a further point to remember: the domicile of the child, if known, is the domicile of its natural parent or parents, and as such it has a legitimate interest in any decision to destroy the relationship between them and their child. In English proceedings extensive provision is made for the safeguarding of the interests of the natural parents. There is no certainty that this will be the case in every foreign adoption: the English courts should be wary of recognizing a foreign adoption in so far as it determines the relationship between the natural parents and their child unless at least it is recognized by their personal law. That the personal law of an orphan (often the subject of adoption) may not be known is irrelevant to a consideration of cases in which the domicile of the natural parents and the child is readily identifiable.

P. B. Carter

[1] See Dicey and Morris, *The Conflict of Laws* (8th ed., 1967), Rule 68.

DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1967*

Tortious liability of the E.E.C.

Case No. 1. Firma E. Kampffmeyer and others v. *E.E.C. Commission.*[1] The *Kampffmeyer* case contains an important discussion on the tortious liability of the European Economic Community, with particular reference to the difficult problems caused when the Community and a member State are joint tortfeasors.

The facts of the case arose out of Regulation 19 of the E.E.C. Council,[2] which provided for the gradual establishment of a common market for cereals. As a transitional measure, each member State was authorized to impose a levy on cereals imported from other member States. The levy represented the difference between the 'threshold price', fixed each year by the importing State, and the 'free delivered price', which represented the prevailing market price in the exporting State, plus the cost of transport to the frontier of the importing State, and which was calculated every day or every week by the E.E.C. Commission on the basis of information supplied by the exporting State. Thus, if the threshold price were $100 and the free delivered price $90, the levy would be $10; if the free delivered price rose to $100 or above, the levy would be nil. The importing State calculated the difference between the free delivered price and the threshold price, and kept the proceeds of the resulting levy. It was intended that the threshold prices in the different member States should later move gradually towards a common average.

In Germany, the rates of the levy were calculated by the *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ('EVSt') and displayed in its offices. Import licences were required for the importation of cereals, but the EVSt was under a duty to supply them on request. Normally the levy was imposed at the rate in force at the time of importation, but in some circumstances the importer of maize could claim to pay the levy at the rate in force at the time when he applied for the import licence; this concession only applied to maize imported during the first nine months of the year.

On 27 September 1963 the E.E.C. Commission fixed the free delivered price for maize exported from France to Germany; but, by an oversight, this price did not take account of the fact that the 1963 crop of maize was due to come on the market on 1 October. Since the free delivered price fixed by the E.E.C. Commission was higher than the German threshold price, the EVSt fixed a nil levy for the importation of French maize. On 1 October the 1963 crop of French maize came on the market at a much lower price, and the plaintiffs, who were German importers of maize, applied to the EVSt for licences to import French maize in 1963 at a nil rate of levy; some of them also entered into contracts for the purchase of French maize.

The requests for import licences were so numerous that the German authorities realized that something had gone wrong. So, relying on the escape clause contained in Article 22 of Regulation 19, they refused to issue any licences in respect of requests made on or after 1 October 1963. This decision came into force at once, but, according to Article 22 of Regulation 19, was subject to subsequent approval by the E.E.C. Commission. On 3 October the Commission authorized the German Government to

* © Dr. Michael Akehurst, 1968.

[1] *Recueil de la jurisprudence de C.J.C.E.*, 13 (1967), p. 317.

[2] *Journal officiel des C.E.*, 5 (1962), p. 933.

maintain its decision in force until 4 October 1963, by which time lower free delivered prices and a higher rate of levy had come into effect.

On 1 July 1965 the Court of Justice of the European Communities annulled the Commission's decision of 3 October 1963, on the grounds that the difficulties resulting from the decision of 27 September 1963 did not constitute serious disturbances capable of endangering the objectives defined in Article 39 of the E.E.C. Treaty;[1] and Article 22 of Regulation 19 made the applicability of the escape clause dependent on the existence of serious disturbances of that nature. In 1966 the plaintiffs brought claims for damages against the Commission in the Court of Justice of the European Communities, and against the German authorities in the Bonn Landgericht. The Bonn Landgericht adjourned the case against the German authorities, pending the decision of the Court of Justice of the European Communities on the claim against the Commission. On 14 July 1967 the Court of Justice of the European Communities handed down an interim judgment; on 30 November 1967 it handed down an interim judgment in another case with virtually identical facts, *Firma Kurt E. Becher* v. *E.E.C. Commission*,[2] which adds one or two details to the principles laid down in the *Kampffmeyer* judgment.

Before considering the merits of the case, the Court had to deal with the question whether the plaintiffs were time-barred. Without challenging the admissibility of the actions on this ground, the defendant sought the Court's guidance on the interpretation of Article 43 of the Protocol to the E.E.C. Treaty on the Statute of the Court, which provided that the period of limitation for proceedings involving the Community's extra-contractual liability should be five years, and that this period should be interrupted either by the institution of proceedings before the Court, or by a preliminary claim addressed to the Community institution concerned; if such a preliminary claim was made (it was purely optional), proceedings had to be instituted before the Court within the next two months (under the provisions of Article 173 of the E.E.C. Treaty dealing with *recours en annulation*) or within the next four months (under the provisions of Article 175 dealing with *recours en carence*). Some of the plaintiffs had instituted proceedings before the Court more than four months after addressing a preliminary claim to the Commission. But the Commission itself argued that the Court's Statute should not be interpreted so as to make the presentation of a preliminary claim have the effect of reducing the period of limitation to two or four months, and the Court construed Article 43 to mean that the presentation of a preliminary claim had the effect, not of abolishing the five-year period, but of *adding* two or four months, as the case might be, to the five-year period.[3] This interpretation is a bold one, but a more literal interpretation would have had the absurd result of penalizing a plaintiff for pursuing the commendable course of trying to settle a claim out of Court before instituting proceedings.

The merits of the case presented the Court with two major problems. In the first place, the Commission was being attacked for having approved action taken by the German Government. Its liability was therefore intimately connected with that of the

[1] *Toepfer* v. *E.E.C. Commission, Recueil de la jurisprudence de C.J.C.E.*, 11 (1965), p. 525. The Court substituted its own opinion for that of the Commission concerning the probable economic consequences of the decision of 27 September 1963, and did not allow any degree of discretion to the Commission.

[2] Ibid., 13 (1967), p. 369.

[3] The Advocate-General Gand thought that the two- or four-month period could only be added to the five-years' period if the preliminary claim was made at the end of the five-year period, but the Court does not seem to have accepted this restriction (ibid., 13 (1967), p. 317, at pp. 337, 351).

German Government, but, whereas the Commission's liability was determined by the Court of the Communities under Community law, the German Government's liability was determined by German courts under German law. Such inconveniences are probably inevitable, at least at the present stage of European integration. Since the E.E.C. can take decisions binding on member States, it would be dangerous, if not absurd, to allow the legality of those decisions to be determined by the courts and the law of a member State. Similarly, many years are likely to elapse before member States permit their subjects to challenge the legality of their administrative acts before the Court of the Communities, by reference to Community law. Although the Court could not save the plaintiffs from the expense of two series of litigation, it had to prevent them from being insufficiently compensated, or compensated twice over, as a result of the duality of litigation.

The second difficulty facing the Court arose from Article 215 (2) of the E.E.C. Treaty, which provides that 'en matière de responsabilité non contractuelle, la Communauté doit réparer, conformément aux principes généraux communs aux droits des États membres, les dommages causés par ses institutions ou par ses agents dans l'exercice de leurs fonctions'. Apart from the *Plaumann* case,[1] this was the first time that the Court had had to apply these provisions, which the Advocate-General Gand described as 'deliberately ambiguous', since there were big differences between the laws of the member States concerning the tortious liability of public authorities; for instance, in France such questions were normally dealt with by administrative courts under administrative law, but in Germany by civil courts under civil law.[2] Article 215 (2) of the E.E.C. Treaty was much less precise than Article 40 of the E.C.S.C. Treaty, which spoke in terms of *faute de service*—a term of art in French administrative law. Actually, although the Court did not outline any principles of tortious liability *in abstracto*, it is clear from the way in which it dealt with the facts of the *Kampffmeyer* case that it was prepared to equate tortious liability (on the facts of that case, at any rate) with *faute de service*, and to rely on the judicial precedents concerning Article 40 of the E.C.S.C. Treaty.

The Court had already decided in the *Toepfer* case[3] that the Commission's decision of 3 October 1963 was illegal and had annulled it. But the Commission now argued that not every illegal decision constituted a *faute de service*. The Court did not contest this as a general proposition, but had no difficulty in deciding that the particular decision in the *Kampffmeyer* case did constitute a *faute de service*. By fixing the free delivered price on 27 September 1963, the Commission had helped to create a legal situation on which the plaintiffs had relied (and acted to their detriment) by applying for import licences and purchasing maize; to destroy that legal situation retroactively, as the decision of 3 October 1963 had done, was a classic example of *faute de service*.[4]

In its defence, the Commission argued that it should not be held liable, because it had made a *reasonable* mistake in deciding that there was a risk of 'serious disturbances' within the meaning of Article 22 of Regulation 19. The Court replied that

> . . . la défenderesse se méprend sur la nature de la faute qui lui est reprochée; que celle-ci ne réside pas dans une appréciation erronée des faits mais dans un comportement

[1] Ibid., 11 (1965), p. 203.

[2] Ibid., 13 (1967), at pp. 347, 352. He therefore considered that the Court should not mechanically seek the highest common factor among the laws of the member States, but that it should adopt a more creative approach and rely on broad similarities.

[3] Ibid., 11 (1965), p. 525.

[4] See the *Algera* case, *Recueil de la jurisprudence de la C.E.C.A.*, 3 (1957), p. 81, at p. 128.

d'ensemble qui s'est essentiellement manifesté par l'utilisation abusive faite de l'article 22, dont certains termes d'ailleurs décisifs ont été méconnus.[1]

In other words, the Commission had not misread the economic situation, but the terms of Article 22. The Court did not therefore pronounce on the Commission's argument that it should, as in French law, enjoy a greater margin of error over economic questions when it was sued for *faute de service* than it would have enjoyed in a *recours en annulation.* Nor did the Court pronounce on the Commission's reference to the principle of German law that a public body cannot be held liable in damages for a slight misinterpretation of a law (as opposed to a misinterpretation which is patent).

The Commission also referred to French and German law, as well as to equivocal dicta in previous cases decided by the Court, in arguing that liability for *supervisory* functions should be confined to cases of *faute lourde.* The Court did not reject this argument out of hand, and the Advocate-General Gand was prepared to accept such a limitation of liability in cases where it was difficult for the supervisory body to keep a close watch over the day-to-day activities of a subsidiary organ. But such a hypothesis was far removed from the facts of the present case.[2] As the Court put it:

> . . . quelle que soit la qualification des pouvoirs que l'article 22 du règlement n° 19 confère à la Commission, celle-ci est tenue à un examen de chaque mesure de sauvegarde communiquée aussi sérieux que celui auquel les gouvernements des États membres sont tenus et elle encourt pour le maintien d'une mesure de sauvegarde une responsabilité indépendante.[3]

Finally the Commission argued that it was not liable to the plaintiffs for acting contrary to Regulation 19, because Regulation 19 was not intended to protect the plaintiffs' interests—a notion borrowed from German and Italian law. The Court held, however, by referring to the text of the Regulation, that, although the Regulation had been enacted in order to further the interests of the general public, it was not intended to do so at the cost of sacrificing the interests of wholesale importers, such as the plaintiffs. Consequently the Commission's argument failed on the facts.

Having established the Commission's liability in principle, the Court now had to assess damages. The damages claimed fell into three categories.

First, some plaintiffs had bought maize on the same day that they had applied for import licences, 1 October 1963, and had imported the maize in January 1964 at the rate of levy which had been substituted for the nil levy in force on 1 October 1963. The loss which they had suffered represented the cost of the levy, and the Court postponed giving a final judgment until they proved that they had exhausted the administrative and judicial remedies available in Germany in order to obtain a refund of the levy from the German authorities; the Community would only be liable to the extent that no redress could be obtained from the German authorities.

Secondly, other plaintiffs had bought maize on the same day that they had applied for import licences, 1 October 1963, but, after the German authorities had refused to issue the licences, had resiled from the contracts of sale and paid compensation to the vendors under the penalty clauses in the contracts (or, in *Becher*'s case, had resold the maize outside Germany at a loss). The Court held that they were entitled to recover the amount of the penalty paid, or of the loss incurred on the resale, provided that it was not excessive. But the plaintiffs also claimed damages for loss of profits, and on

[1] *Recueil de la jurisprudence de C.J.C.E.*, 13 (1967), p. 339. This distinction is hard to reconcile with the Court's decision in the *Toepfer* case (ibid., 11 (1965), p. 525); see above, p. 312, n. 1

[2] Ibid., 13 (1967), p. 358.

[3] Ibid., 13 (1967), p. 340.

this point the Court was less sympathetic, holding that the plaintiffs must have known that the Commission had made a mistake when fixing the free delivered price on 27 September 1963, and that it would be wrong to allow the plaintiffs to make a speculative gain out of such a mistake, especially since, 'renonçant aux opérations envisagées, elles se sont soustraites d'elles-mêmes à tout risque commercial inhérent à l'importation en la République fédérale';[1] consequently the Court held that the maximum sum which could be awarded as damages for loss of profits would be equal to 10 per cent of the sum which the plaintiffs would have had to pay by way of levy if they had imported the maize into Germany. But, once again, the Court postponed giving a final judgment pending the outcome of the plaintiffs' actions against the German authorities; the Community would not be liable to pay any damages whatsoever except to the extent that compensation could not be obtained from the German authorities.

The Court also required the plaintiffs in the first and second categories to prove that they had concluded their contracts of sale in reliance on the nil rate of levy in force on 1 October 1963. In other words, no damages could be awarded in respect of contracts concluded on subsequent days. The Commission wanted to go further and to reduce the damages payable if the contracts had been concluded after 2.15 p.m. on 1 October, the time when the nil rate of levy had been withdrawn in anticipation of the decision to suspend the issue of import licences. But, since it was normal for the rate of levy in force at the beginning of a day to remain in force throughout that day, the Court declined to adopt this solution, and instead invited the Commission to prove that the contracts entered into by the plaintiffs on 1 October had been concluded after they had learnt of the withdrawal of the nil rate of levy.

The third category of plaintiffs had applied for import licences and had intended to buy maize, but had never actually bought any, because they had learnt in the meantime of the decision to refuse import licences. The Court held that a mere intention to import maize was too insubstantial to give rise to a claim for loss of profits, and dismissed these claims. However, since there had nevertheless been a *faute de service*, the Court did not award costs against the plaintiffs. (No decision was made as to costs in the other actions, pending the final judgment.)

The solutions adopted by the Court may seem clumsy and involved, but they were the best answer to a difficult problem. The E.E.C. Commission and the German authorities were both to blame for the losses suffered by the plaintiffs, but the two defendants were being sued in different courts, under different systems of law. The Court of the Communities could not know how much to award as damages against the Commission until it knew how much the German courts were going to award against the German authorities—otherwise the plaintiffs might receive insufficient or excessive compensation. There are only two solutions—either the German courts wait until the Court of the Communities has decided, or else the Court of the Communities waits until the German courts have decided. Under the latter alternative, which the Court adopted, the Community would only be liable in damages if no compensation could be obtained from the German authorities; so, assuming that German law gives the citizen adequate protection against the State, the German authorities would probably have to pay more compensation than the Community. But this solution is not inappropriate to the facts of the case, since, although the Commission was to

[1] Ibid., 13 (1967), p. 344. The Advocate-General Gand pointed out (p. 363) that, if the abnormally large quantity of maize, for which import licences had been requested on 1 October 1963, had been imported into Germany, it would have depressed the prevailing prices in Germany, thus reducing the plaintiffs' profits.

blame for miscalculating the free delivered price on 27 September 1963, it was the German Government which used to keep the proceeds of the levy system and which took the initiative in invoking the escape clause at the beginning of October 1963—the Commission's function was limited to granting or withholding approval of the German Government's decision.

Nevertheless, difficulties remain. What sort of judgment does the Court of the Communities require from the German courts? Would a test case be sufficient, or must all the plaintiffs institute proceedings before German courts? Must they fight the case up to the court of last instance in Germany, or would the Court of the Communities be content with a first instance German decision denying the liability of the German authorities? When these questions were asked in the *Becher* case, the Court replied cautiously but unhelpfully that it all depended on the facts of the case.[1]

Restrictive practices—administrative acts subject to review in a recours en annulation

Case No. 2. Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others v. *E.E.C. Commission.*[2] This case is concerned with restrictive practices, and with the definition of the type of administrative acts which are subject to review by the Court in a *recours en annulation.*

Article 85 (1) of the E.E.C. Treaty prohibits various forms of restrictive practices, subject to certain exceptions specified in Article 85 (3). Regulation 17 of the E.E.C. Council[3] provides, *inter alia*, for the notification of restrictive practices to the Commission (Article 4) and for the imposition of fines on undertakings participating in restrictive practices which are contrary to the Treaty (Article 15 (2) (*a*)). Article 15 (5), (6) states as follows:

> 5. The fines provided for in paragraph 2, sub-paragraph (*a*), may not be imposed for actions taking place:
>
> (*a*) after the notification to the Commission and prior to its decision regarding the application of Article 85, paragraph 3, of the Treaty. . .
>
> (*b*) . . .
>
> 6. Paragraph 5 shall not apply once the Commission has informed the undertakings concerned that after a preliminary examination it considers that the conditions of Article 85, paragraph 1, of the Treaty have been fulfilled and that application of Article 85, paragraph 3, is not warranted.

The plaintiffs were parties to an agreement regulating the supply of cement to the Netherlands. They notified the agreement to the Commission on 31 October 1962, in order to obtain recognition that it fell within the terms of Article 85 (3) of the Treaty. On 8 April 1965 Mr. von der Groeben, a member of the Commission, suggested that they should make certain amendments to the agreement in order to bring it into line with the Treaty. For some months thereafter negotiations continued between the Commission's staff and the plaintiffs concerning alterations to the agreement, but no solution was reached. Finally, on 14 December 1965, the Commission decided to

[1] *Recueil de la jurisprudence de C.J.C.E.*, 13 (1967), p. 369, at p. 390. The Advocate-General Gand suggested that a test case would be sufficient to decide the question of principle (liability or no liability), but that each plaintiff would have to bring a separate action to determine the damages payable, once liability had been established (p. 397). He also referred to the possibility that the German court might adjourn the case and never resume consideration of it (p. 396); this raises the possibility of a vicious circle developing, with the Court of the Communities adjourning till the decision of the German courts, and the German courts adjourning till the decision of the Court of the Communities.

[2] Ibid., 13 (1967), p. 93.

[3] *Journal officiel des C.E.*, 5 (1962), p. 204.

apply Article 15 (6) of Regulation 17, and empowered Mr. von der Groeben to authorize the Director-General of the Competition Department (one of the Commission's employees) to sign and dispatch a letter to that effect to the plaintiffs. On 3 January 1966 the Director-General sent the plaintiffs a letter, which, after summarizing the agreement to which they were parties, stated as follows:

La Commission a soumis l'accord en question à un examen provisoire. Elle est arrivée à la conclusion que les conditions d'application de l'article 85, paragraphe 1, du traité sont remplies et qu'une application de l'article 85, paragraphe 3, audit accord, dans la forme où il a été notifié, n'est pas justifiée. La Commission a l'honneur de vous communiquer les résultats de cet examen provisoire en application de l'article 15, paragraphe 6, du règlement n° 17. . . .

La Commission vous informe à cette occasion que les dispositions de l'article 15, paragraphe 5, du règlement n° 17 susmentionné, qui avaient pour effet de suspendre provisoirement l'application à l'accord notifié des prescriptions en matière d'amendes figurant à l'article 15, paragraphe 2, alinéa *a*, dudit règlement, cesseront de s'appliquer à l'accord à partir de la réception de la présente communication.

J'ai l'honneur de vous demander de bien vouloir me faire savoir dans un délai de six semaines (à compter de la réception de la présente lettre) si vous avez mis fin à l'application de l'accord en question.

The plaintiffs instituted a *recours en annulation* against the letter.

The admissibility of the plaintiffs' action produced a sharp controversy. Article 173 of the E.E.C. Treaty states, in effect, that a *recours en annulation* must be directed against regulations, directives or decisions. The letter of 3 January 1966 was clearly not a regulation or a directive, but the question whether or not it was a decision was far less easy to answer. The administrative decision is the central organizing concept of continental systems of administrative law, and much of the Court's case-law has been devoted to the definition of that concept. This is inevitable, because a *recours en annulation* (the most frequently used remedy) must be directed against a decision (or regulation or directive), not against acts which merely prepare the way for a future decision or confirm a past decision, and the extremely short period of limitation (two months) runs from the date when the plaintiff received notice of the decision. Consequently, a plaintiff who appeals to the Court precipitately will find his case dismissed because it is directed against a preparatory act, and a plaintiff who waits too long will find his case dismissed because it is directed against a confirming act. There is nothing corresponding to the English remedies of prohibition and injunction, which enable the High Court to prevent public bodies from taking an *ultra vires* decision in the future or from enforcing *ultra vires* decisions taken in the past, and which probably explain why English courts have never troubled much with defining the concept of a decision. On the other hand, the effect of the rules governing access to the Court of the Communities is to require legal proceedings to be instituted within a very short time-limit, an effect which is indispensable for the security of legal relationships in a system where the judiciary is much bolder than English courts in its readiness to quash administrative decisions.

According to the definition given in Article 189 of the E.E.C. Treaty, 'la décision est obligatoire en tous ses éléments pour les destinataires qu'elle désigne'. The defendant argued that the letter of 3 January 1966 constituted an opinion, not a decision, because it imposed no obligations. (Article 173 of the Treaty excludes opinions from review by the Court). But the Court did not adopt this restrictive definition:

attendu que, par l'effet des actes des 14 décembre 1965 et 3 janvier 1966, les entreprises

ont été transférées de l'exemption d'amende de l'article 15, paragraphe 5, qui les protégeait, sous le régime contraire de l'article 15, paragraphe 2, qui les menace désormais;

que cette mesure les a privées du bénéfice d'une situation juridique attachée par l'article 15, paragraphe 5, à la notification de l'accord, pour les exposer à un grave risque pécuniaire;[1]

que ladite mesure a donc affecté les intérêts des entreprises en apportant à leur situation juridique une modification caractérisée;

que l'acte litigieux, par lequel la Commission a arrêté, de manière non équivoque, une mesure comportant des effets juridiques affectant les intérêts des entreprises concernées et s'imposant obligatoirement à elles, constitue, non un simple avis, mais une décision.

To put it in Hohfeldian terms, a decision need not impose an obligation; it can also impose a liability. But it should be noted that the Court simply gave its reasons for holding that the letter of 3 January 1966 constituted a decision; it did not attempt to give a general or exhaustive definition of all decisions.

Since the letter constituted a decision, it should have been signed by a member of the Commission. In fact it was drafted and signed by an employee of the Commission, and did not even state that the power so to act had been delegated to him by the Commission. But the Court said 'que le doute que pourrait susciter la régularité de la notification de ladite décision n'altère en rien la nature de celle-ci et ne saurait affecter la recevabilité du recours'. In other words, the irregularity of the way in which the decision had been notified might make it voidable, but did not make it void. This is clearly a sensible view, in the light of the Court's over-logical insistence that a void decision is absolutely non-existent in the eyes of the law and that no appeal lies against a nullity.[2]

The Court went on to hold that any conclusion reached by the Commission under Article 15 (6) of Regulation 17 must constitute a decision because it involved the Commission in deciding difficult questions of fact and law. The point of this argument is presumably that the Commission's conclusion clarified points which were unclear before, and that the conclusion was therefore *in practice* not declaratory but constitutive in its legal effects—despite Article 1 of Regulation 17, which provides that the agreements mentioned in Article 85 (1) of the Treaty 'sont interdits sans qu'une décision préalable soit nécessaire'.

The Court then proceeded to reject certain arguments raised by the defendant.

First, the defendant considered that the notification mentioned in Article 15 (6) constituted a mere opinion because Article 15 (6) did not use the term 'decision'. The Court pointed out that it did not use the term 'opinion', either, and held that 'le silence du texte, en une matière qui affecte la garantie des droits des particuliers, ne saurait conduire à l'interprétation la plus défavorable à ceux-ci'—a principle of

[1] There was only a risk, not a certainty, of a fine, because, quite apart from the possibility of leniency on the part of the Commission, the conclusion reached by the Commission under Article 15 (6) was based on a 'preliminary examination', and might therefore have been revised during the fuller examination which would have taken place if the Commission had later considered whether or not to impose a fine.

[2] *Société des Usines à Tubes de la Sarre* v. *High Authority, Recueil de la jurisprudence de la C.E.C.A.*, 3 (1957), p. 201, at p. 220. Unlike English law, Community law treats almost all illegal decisions as voidable, not void. Cf. *S. A. Usines Émile Henricot and others* v. *High Authority, Recueil de la jurisprudence de C.J.C.E.*, 9 (1963), p. 439, at p. 455: 'ne saurait . . . être reconnu comme décision un acte qui notamment n'apparaîtrait pas délibéré et pris par la Haute Autorité et ne serait pas authentifié par la signature de l'un de ses membres.' The letter in the present case clearly failed the second test but presumably just passed the first test.

interpretation laid down by the Court seven years before in the *Humblet* case,[1] but which is the direct opposite of the restrictive presumption of classical international law concerning the interpretation of *compromis d'arbitrage*. Likewise the Court did not agree that the provisional nature of the Commission's notification under Article 15 (6) robbed it of its character as a decision: 'malgré son caractère provisoire, l'acte par lequel la Commission statue en l'espèce constitue le *terme ultime d'une procédure spéciale*, distincte de celle qui, après l'application de l'article 19, doit permettre ensuite de statuer au fond.' Or, as the Advocate-General Roemer put it, the conclusion reached by the Commission had definite legal consequences, even though the Commission was entitled to alter its conclusion at a later date; he suggested that the relationship between a provisional decision under Article 15 (6) and a final decision under Article 19 was similar to the relationship between an interlocutory judgment and the final judgment of a court.[2]

Secondly, the defendant argued that it was unnecessary to allow judicial review of provisional decisions under Article 15 (6), since judicial review could be directed against final decisions under Articles 6 and 19. However, the Court held

> que, si la mesure provisoire était exclusive de tout contrôle judiciaire, elle ne laisserait aux entreprises d'autre alternative, quel que soit leur éventuel bon droit, que le risque d'une grave menace d'amende ou la rupture préjudiciable[3] d'un accord qui, en cas de recours, eût pu échapper aux rigueurs de l'interdiction;
>
> qu'elle aurait ainsi pour effet pratique de dispenser la Commission de rendre une décision finale grâce à l'efficacité de la simple menace d'amende.

Finally, the Commission contended that its work in the field of restrictive practices would be delayed and complicated if notifications under Article 15 (6) had to comply with all the formalities required for decisions *stricto sensu* and were subject to review by the Court. The Court replied:

> que cette objection, sans pertinence en une espèce dans laquelle plus de trois années ont séparé la notification de l'accord de la décision provisoire, est, de toute manière, sans portée à l'encontre des garanties individuelles prévues par le traité et qui prévalent sur tous textes réglementaires;
>
> que ces objections doivent donc être écartées.

Having decided the issue of admissibility in the plaintiff's favour, the Court also gave judgment for the plaintiffs on the merits—on the grounds that the letter of 3 January 1966 gave no reasons for the decision.[4] (It was because the Commission had considered that the letter did not constitute a decision that it had failed to give reasons

[1] Ibid., 6 (1960), p. 1125. To hold that the notification was an 'opinion' would have been 'unfavourable' to the plaintiffs because no *recours en annulation* lies against an opinion.

[2] Ibid., 13 (1967), pp. 118, 131, 133.

[3] The Advocate-General Gand explained that the dissolution of the agreement would be 'préjudiciable' because the parties to it 'auront des difficultés considérables à remettre en marche une organisation de marché à laquelle elles avaient mis fin' (ibid., p. 135).

[4] In *Société des Usines à tubes de la Sarre* v. *High Authority* (*Recueil de la jurisprudence de la C.E.C.A.*, 3 (1957), p. 201, at p. 220) the Court held that a decision which gave no reasons was a nullity, and that no appeal lay against a nullity. (In such circumstances, however, the plaintiff gains as much in practice by losing on the question of admissibility as he would by winning on the merits—except perhaps as regards costs.) But that decision has not been followed in any subsequent case, and the Advocate-General Roemer distinguished it (correctly, it is submitted) on the grounds that it only concerned 'opinions' issued by the High Authority on questions of investment under Article 54 of the E.C.S.C. Treaty (*Recueil de la jurisprudence de C.J.C.E.*, 13 (1967), at p. 137).

or to have the letter signed by one of its own members.) The Court conceded that the reasons might be stated *briefly* 'en raison du caractère provisoire de la procédure', but the reasons 'n'en doivent pas moins apparaître de la décision elle-même avec une clarté suffisante pour permettre à la Cour et à tous intéressés de constater la correcte application des textes'.

Deciding the case on this ground, the Court considered it unnecessary to express an opinion about the other grounds on which the plaintiffs had challenged the decision, namely, the fact that the letter of 3 January 1966 had not been drafted or signed by a member of the Commission;[1] the fact that the Commission had adopted its decision on 14 December 1965 without a meeting, by virtue of the 'procédure écrite' (i.e. the President had simply ascertained the other members' views in writing); and the fact that the Commission had not consulted the Consultative Committee, consisting of representatives of member States, set up by Article 10 of Regulation 17. On the two latter points, the Advocate-General Roemer advised as follows:

> En raison des dispositions spéciales prévues par le règlement intérieur (distribution d'un projet détaillé pour les délibérations et possibilité de s'opposer à la procédure écrite), nous n'estimons pas que la procédure écrite d'élaboration des décisions doit être réduite à des affaires de pure routine; tout au moins, il ne semble pas qu'il y ait détournement de procédure lorsque la Commission l'utilise pour l'examen provisoire dans le cadre de la procédure prévue en matière d'ententes, avant d'adresser une communication au sens de l'article 15, paragraphe 6.—En outre, nous avons déjà souligné qu'en raison de la nature et des fonctions particulières de la communication au sens de l'article 15, paragraphe 6, il n'est pas nécessaire d'exiger la consultation préalable du comité consultatif, parce qu'elle entraînerait un retard intolérable de la procédure à cause des formalités et des délais applicables. . . .

Restrictive practices—interpretation of the E.E.C. Treaty

Case No. 3. S.A. Brasserie de Haecht v. *Consorts Wilkin-Janssen.*[2] This case, referred to the Court of Justice of the European Communities by the Liège Commercial Tribunal under Article 177 of the E.E.C. Treaty, deals with the interpretation of the Treaty provisions on restrictive practices.

The plaintiff was a Belgian brewery company, and the defendants were retail dealers in beer and other drinks at Esneux, a small town in Belgium. In 1963 the plaintiff made a loan worth 52,000 Belgian francs (£4,333) to the defendants, who promised, in a series of standard-form contracts, to buy all their beer and soft drinks from the plaintiff. In 1966 the plaintiff discovered that the defendants had been buying beer and soft drinks elsewhere, and began proceedings for breach of contract before the Liège Commercial Tribunal. The defendants pleaded that the standard-form agreements were void under Article 85 of the E.E.C. Treaty.

One of the conditions which must be proved in order to establish the nullity of an agreement under Article 85 is that the agreement must be capable of affecting trade between member States. Clearly the agreements in dispute did not fulfil this requirement when considered on their own, since the defendants were only one of a host of small retailers, and had an annual turnover of only 42 hectolitres (924 imperial gallons). The position would not be altered by proving that the plaintiff imposed similar agreements on other retailers;[3] there were nearly 300 brewery companies in Belgium, and

[1] See above, p. 318. [2] *Recueil de la jurisprudence de C.J.C.E.*, 13 (1967), p. 525.

[3] The relevance of this factor, when considering whether a particular agreement is contrary to Article 85, can probably be inferred by analogy from the Court's decision in the *Grundig* case (ibid., 12 (1966), p. 429 at p. 497).

the plaintiff produced less than 2 per cent of the beer sold in Belgium. What the defendants argued was that most of the retailers in Belgium were bound by similar agreements entered into with one or other of the Belgian breweries, and that the agreements in the present case therefore formed part of a general pattern which affected trade between member States by making it difficult for non-Belgian breweries to sell their beer in Belgium. But it was by no means certain that the effects of agreements between other breweries and other retailers could be taken into account when determining the legality of particular agreements in any single case. The Liège Commercial Tribunal therefore put the following question to the Court of Justice of the European Communities, under Article 177 of the E.E.C. Treaty:

Y a-t-il lieu, pour apprécier si les contrats litigieux sont interdits par l'article 85, paragraphe 1, du traité de Rome, de tenir compte du contexte économique et de l'ensemble du marché, c'est-à-dire en l'espèce, de l'existence simultanée d'un grand nombre de contrats du même genre imposés par un nombre réduit de brasseries belges à une fraction très importante de débitants de boissons ou faut-il s'en tenir à l'examen des effets exercés sur le marché par lesdites conventions envisagées isolément?

Article 85 (1) of the E.E.C. Treaty provides as follows:

Sont incompatibles avec le marché commun et interdits tous accords entre entreprises, toutes décisions d'associations d'entreprises et toutes pratiques concertées, qui sont susceptibles d'affecter le commerce entre les États membres et qui ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence à l'intérieur du marché commun. . . .

The Court answered the question put by the Liège Commercial Tribunal by breaking up Article 85 (1) into three separate phrases, which it examined in turn.

First, the Court noted that the Article applied not only to agreements between undertakings, but also to decisions by associations of undertakings and to concerted practices, and remarked:

qu'en visant ainsi à la fois les accords entre entreprises, les décisions d'associations d'entreprises et aussi les pratiques concertées qui peuvent intéresser de nombreux participants, l'article 85, paragraphe 1, implique la possibilité de considérer l'ensemble des éléments constitutifs desdits accords, décisions et pratiques.

The author confesses to experiencing difficulty in seeing the point of this remark. The 'éléments constitutifs' of an 'accord entre entreprises' surely cannot include the practice followed by other undertakings (leaving aside the scarcely relevant possibility of commercial practice giving rise to an implied term in the contract). Similarly, the fact that one must consider the activities of many parties, when many parties participate in associations of undertakings and concerted practices, does not mean that one must consider the activities of many parties when one is dealing with a bilateral agreement. It is possible that the Court intended to imply that the similarity of obligations imposed by different manufacturers on their respective retailers constituted a 'pratique concertée'; but the word 'concertée' surely suggests deliberate co-operation, not a mere coincidence.[1]

Second, the Court observed that restrictive practices, in order to be prohibited by Article 85, must have 'pour objet ou pour effet d'empêcher, de restreindre ou de

[1] Larousse defines *concerter* as 'préparer en commun l'exécution d'un dessein', and *se concerter* as 'se mettre d'accord pour agir ensemble'.

fausser le jeu de la concurrence', and the Court held that the effects of an agreement cannot be considered in isolation from the effects of other similar agreements:

attendu, d'autre part, qu'en frappant les accords, décisions ou pratiques en raison, non seulement de leur objet, mais aussi de leurs effets au regard de la concurrence, l'article 85, paragraphe 1, implique la nécessité d'observer ces effets dans le cadre où ils se produisent, c'est-à-dire dans le contexte économique et juridique au sein duquel ces accords, décisions ou pratiques se situent et où ils peuvent concourir, avec d'autres, à un effet cumulatif sur le jeu de la concurrence;

qu'il serait vain, en effet, de viser un accord, une décision ou une pratique en raison de leurs effets, si ceux-ci devaient être séparés du marché où ils se manifestent et ne pouvaient être examinés que détachés du faisceau d'effets, convergents ou non, au milieu desquels ils se produisent;

que, pour apprécier si elle est frappée par l'article 85, paragraphe 1, une convention ne peut donc être isolée de ce contexte, c'est-à-dire des circonstances de fait ou de droit ayant pour conséquence qu'elle a pour effet d'empêcher, restreindre ou fausser le jeu de la concurrence;

que, par rapport à cet objectif, l'existence de contrats similaires peut être prise en considération dans la mesure où l'ensemble des contrats de ce genre est de nature à restreindre la liberté du commerce.

The Court did not discuss whether the existence of other similar agreements should also be taken into account when considering the object of an agreement. The Advocate-General Roemer answered this question in the negative, because 'l'expression "ont pour objet" . . . s'attache à la volonté des intéressés, à ce qui est en leur pouvoir';[1] but is it not possible that the parties may have been influenced by the existence of other similar agreements when forming their own intentions?

Third, the Court noted that Article 85 was limited to restrictive practices capable of affecting trade between member States; here again, it was a question of the effects of restrictive practices, which could not be considered in isolation from the effects of the practices pursued by other parties:

attendu enfin que c'est seulement dans la mesure où les accords, décisions ou pratiques peuvent affecter le commerce entre États membres que l'altération du jeu de la concurrence relève des prohibitions communautaires;

que, pour remplir cette condition, l'accord, la décision ou la pratique doit, sur la base d'un ensemble d'éléments objectifs de droit ou de fait, permettre d'envisager qu'il est en mesure d'exercer éventuellement une influence directe ou indirecte sur les courants d'échange entre États membres, de contribuer au cloisonnement du marché et de rendre plus difficile l'interpénétration économique voulue par le traité;

que, pour l'appréciation de cet élément, l'accord, la décision ou la pratique ne peut donc pas non plus être séparé de tous autres au milieu desquels il est inséré;

attendu que l'existence de contrats similaires est une circonstance qui, avec d'autres, peut former un ensemble constitutif du contexte économique et juridique dans lequel le contrat doit être apprécié;

que si cette situation doit donc être prise en considération, elle ne saurait cependant être à elle seule considérée comme déterminante;

qu'il ne s'agit là, en effet, que d'un élément parmi d'autres pour savoir si, par le moyen d'une éventuelle altération du jeu de la concurrence, le commerce entre États membres est susceptible d'être affecté.

For these reasons, the Court gave the following reply to the question raised by the Liège Commercial Tribunal:

[1] *Recueil de la jurisprudence de C.J.C.E.*, 13 (1967), at p. 451.

Les conventions par lesquelles une entreprise s'engage à ne se fournir que dans une entreprise à l'exclusion de toute autre ne réunissent pas, par leur seule nature, les éléments constitutifs de l'incompatibilité avec le marché commun, prévus à l'article 85, paragraphe 1, du traité. Elles peuvent cependant les réunir lorsque, soit isolément, soit simultanément avec d'autres, dans le contexte économique et juridique dans lequel elles sont intervenues et sur la base d'un ensemble d'éléments objectifs de droit ou de fait, elles sont susceptibles d'affecter le commerce entre États membres et ont, soit pour objet, soit pour effet, d'empêcher, restreindre ou fausser le jeu de la concurrence.

The Court reached its conclusions by an analytical method of interpretation, but its answer would have been the same if it had followed the more policy-oriented approach of the Advocate-General Roemer. Herr Roemer pointed out that the Common Market was intended to break down State-created obstacles to the free movement of goods, and that the purpose of the provisions on restrictive practices was to prevent those State-created obstacles from being replaced by obstacles of private origin. He argued that an extensive interpretation was necessary in order to give effect to the purpose of the Treaty provisions in the present case; although the agreements between the plaintiff and the defendants were perfectly innocuous if considered in isolation, the imposition of similar agreements by the vast majority of Belgian breweries on their retailers would make it very difficult for foreign breweries to break into the Belgian market:

Si, dans une situation de ce genre . . . , on se voyait tenu d'envisager chacun des accords isolément et empêché dès lors d'appliquer l'article 85 du traité, cela pourrait faire apparaître dans le système du droit des ententes une dangereuse lacune, que les législations nationales en la matière se révèlent inaptes à combler (puisque, normalement, elles ne se soucient pas des échanges interétatiques). . . .[1]

One important question which is left unsettled by the Court's opinion is its effect upon the interpretation of Article 86, which, subject to certain conditions, prohibits the abuse of dominant positions on the market. The E.E.C. Commission, which intervened in the proceedings before the Court, believed that the Court's opinion might be applicable by analogy to Article 86; in other words, the imposition, by coincidence, of similar agreements by several manufacturers on their retailers might constitute an abuse of a dominant position on the market.[2] The Advocate-General Roemer, however, considered that Article 86 only applied to cases of monopoly and oligopoly.[3] With respect, it is submitted that the Commission was right, since the analytical and practical arguments which justified an extensive interpretation of Article 85 apply with equal force to Article 86.

MICHAEL AKEHURST

[1] Ibid., 13 (1967), pp. 544–5.
[2] Ibid., 13 (1967), p. 534.
[3] Ibid., 13 (1967), p. 545.

REVIEWS OF BOOKS

Académie de Droit International de la Haye: Recueil des cours, 1963. Volume 110. Leyden: A. W. Sijthoff, 1966. 841 pp. *Recueil des cours, 1964.* Volume 112. Leyden: A. W. Sijthoff, 1964. 549 pp. *Recueil des cours, 1964.* Volume 113. Leyden: A. W. Sijthoff, 1966. 651 pp. £4 15*s.* each.

The final volume of the collection for 1963 commences with a vigorous discussion (pp. 7–150) of 'Implementation of International Protection of Human Rights' by Dr. Golsong, the Registrar of the European Court of Human Rights. He points out that whilst there is general agreement on the need for recognition of fundamental human rights, there is no agreement on measures for implementing protection of such rights on a world-wide basis. These lectures include an excellent account of the machinery of the European Convention and refer, *inter alia*, to non-judicial measures provided by the International Labour Organization and other agencies. In his conclusions Dr. Golsong emphasizes the need for 'depolitization' of machinery and expresses the view that, apart from the sphere of certain technical matters such as labour conditions, reasonable protection can be ensured only on a regional basis. There follows a detailed course by Professor Capotorti on 'La capacité en droit international privé' (pp. 138–270).

Professor Ténékidès devotes his lectures (pp. 277–418) to 'Régimes internes et organisation internationale'. This is an essay in political science and the object is to examine the relation of national types of political regime and the policies of international organization. Necessarily some of the comments offered might be thought to be sufficiently obvious but the general treatment is useful and thought provoking. This volume is completed by an extensive course (pp. 423–809) by Professor Giraud entitled 'Le droit international public et la politique'; Professor Giraud, who had a long and distinguished career, died in 1965. The theme of these lectures is one which cannot be examined often enough but it might have been better if Professor Giraud had been more selective. He covers a great deal and the success of the treatment varies. However, certain parts of the material make very good reading. One may note particularly the chapter headed 'Les caractères et les procédés du droit international public', which contains discussions of the control of the application of international law and of sanctions, and the chapter on the formation of law. The treatment is often polemical but some mordant comments are made and carefully illustrated.

The first volume of the collection for 1964 has been reviewed in the previous *Year Book*. The second volume commences with a probing and original study (pp. 7–87) by Jonkheer H. F. van Panhuys of 'Relations and Interactions between International and National Scenes of Law'. The complexities are analysed and there is emphasis on the practical experience. In particular van Panhuys concludes 'that the issue of adoption versus transformation should not be presented as a dogmatic issue'. There is a particularly useful bibliography. The volume continues with a substantial and lively study (pp. 95–268) by Professor Gerhard Kegel of 'The Crisis of Conflict of Laws'. His task is to subject the ideas of some influential jurists to critical examination. The first inquiry is into the 'forum faction' represented by Brainerd Currie and the approach of Currie is characterized as a 'regrettable deviation in conflicts law'. There follows a critique of the views of Professor Albert A. Ehrenzweig, which concludes with the observation

that 'Ehrenzweig's doctrine of the basic rule of the *lex fori* appears to me to be unsubstantiated *de lege lata* and undesirable *de lege ferenda*, since it represents an anachronism in a world which is becoming increasingly smaller'. Finally, he approaches the views of those who would replace conflict of laws rules by new special departments of substantive law. Phocion Francescakis of the *Centre National de la Recherche Scientifique* contributes a course (pp. 275–360) entitled 'Problèmes de droit international privé de l'Afrique noire indépendante'. The object is to explore the optimum legislative policy for developing States and to determine the factors conducive to the appearance of 'un droit international privé mis au service du développement'. The problems involve in part issues of internal conflict of laws.

'La portée et les effets juridiques des attitudes et des actes unilatéraux des états' is the subject of lectures by Professor Venturini (pp. 367–466). This area of problems has attracted a number of writers recently but the present treatment is a significant addition to the ample literature. The approach is comprehensive and yet not too doctrinal; and Professor Venturini places matters in a precise technical context where others have tended to rely on somewhat superficial categories of 'protest' or 'promise'. The volume is completed by the study by Professor Werner von Steiger devoted to 'La protection des mineurs en droit international privé' (pp. 473–517).

The third volume for 1964 has much to offer. Manfred Lachs contributes a course (pp. 7–114) on 'The International Law of Outer Space' which is informative and carefully documented. Facile conclusions are avoided and there is a distrust of analogies from sea and air law. The view, surely correct, of the 'boundary problem' is that each issue should be solved on its own merits and that there is no necessity to have an omnibus definition. 'Third-party Judgement and International Economic Transactions' is the subject of lectures by Charles M. Spofford of the New York Bar. His concern is the economic transaction between States and 'non-State parties' and the existing machinery and proposals for the future relating to settlement of disputes in this context. The subject is carefully related to the economic and political background and thus to the philosophy of the giving of aid to developing countries. The assumptions made are in favour of the capital exporting States, but the treatment both of the law and the background is skilful and provides some valuable insights. His approach may be compared with that of Professor Sereni in Volume 96 of the *Recueil*. Professor Quadri contributes a learned and analytical general course (pp. 246–477), which concentrates on the relation of national and international law, the sources of law, its subjects and responsibility. Among the issues the subject of incisive commentary are *jus cogens*, unilateral acts, the personality of organizations, recognition and the notion of 'imputation'. The volume closes with the lectures of Professor Verosta on 'International Law in Europe and Western Asia between 100 and 650 A.D.' (pp. 491–603). This is an area rarely explored by writers in English and in any case it is unusual for the historical material to be expounded with a perspective of the history of international law. Professor Verosta concludes that the Byzantine Empire played an important role in ensuring continuity in the history of international law since development in the West Roman Empire and the Persian Empire did not show a comparable continuity.

IAN BROWNLIE

Académie de Droit International de la Haye: Recueil des cours, 1965. Volume 114. Leyden: A. W. Sijthoff, 1965. 580 pp. *Recueil des cours, 1965.* Volume 115. Leyden: A. W. Sijthoff, 1965. 628 pp. *Recueil des cours, 1965.* Volume 116. Leyden: A. W. Sijthoff, 1965. 490 pp. £4. 15*s.* each.

The collection for 1965 opens with a short study (pp. 5–55) by Professor Lunz devoted to 'Conflict of Laws in International Sale: Theory and Practice of Socialist Countries'. There follows a very useful course on 'The Geneva Conventions of 1949' by Colonel G. I. A. D. Draper. The treatment is characterized by clarity and concern with the practical problems of application. Professor Louis Henkin provides a stimulating examination of 'International Law and the Behaviour of Nations' (pp. 171–276). The object is psychological and sociological: to explore in a preliminary way the influence international law exerts on the conduct and policies of nations. The result is necessarily impressionistic to some extent but there is also a quantity of hard information, common sense and reasonable supposition. The Suez conflict of 1956 and the Cuban 'quarantine' of 1962 are among the episodes discussed. The force of the study could perhaps have been increased if parallel problems in the context of national law had been noticed, however briefly. Professor Georges Berlia gives a short course (pp. 287–331) under the title 'Contribution à l'interprétation des traités'. Among the issues which receive thoughtful comment is the relevance of the distinction between *traité-loi* and *traité-contrat*. The collection continues with lectures by Félix Schnyder, United Nations High Commissioner for Refugees, on 'Les aspects juridiques actuels du problème des réfugiés' (pp. 339–446). The approach is analytical and thorough, and the limitations of the existing legal institutions are carefully explained. Interesting views are expressed on the formation of customary rules on the status of refugees (pp. 374–5). The volume concludes with a study (pp. 455–551) by Professor Roger Pinto of 'Les règles du droit international concernant la guerre civile'. This is a careful and objective treatment of a notoriously difficult and significant area of the law. The complexities are recognized and special facets are examined, including the role of regional organizations and the *jus in bello*. The whole is carefully documented.

The second volume of lectures given in 1965 commences with the course (pp. 5–58) by Judge Donner of the Court of Justice of the European Communities, under the title 'Les rapports entre la compétence de la Cour de Justice des Communautés Européennes et les tribunaux internes'. Judge Donner provides valuable insight into the nature of the Communities and the type of interpenetration of legal systems involved. He is concerned to demonstrate that respect for the law of the Communities will not be successfully developed by the unilateral acts of the Court of Justice but depends on the collaboration of judicial functions both at the Community and national levels. There follows a course (pp. 67–144) by Professor Beitzke on 'Les obligations délictuelles en droit international privé', which is based on considerable learning and is the more significant in view of the fact that the literature in English has tended to neglect the subject. The 'General Course of Public International Law' (pp. 151–467) is contributed by Professor Bishop. This is a lively presentation which stresses the practical side of the law and includes a quantity of pertinent and useful citation. The depth of the discussion inevitably varies but among the topics accorded special attention are the sources, legal personality, treaties, State responsibility and the use of force. Professor Bishop approaches problems concerning concession agreements and expropriation with more caution than is commonly found in recent American literature. Of particular interest is his discussion of the future of State responsibility. The very

rewarding course (pp. 477–582) by Jens Evensen on 'Aspects of International Law Relating to Modern Radio Communications' completes this volume. This course combines a careful account of the historical development with an examination of the 'general principles of international radio law'. Matters dealt with include radio activities in outer space, radio propaganda and pirate broadcasting.

Private international law has a large place in the third volume for 1965. The relevant courses are: 'Les rapports entre droit uniforme et droit international privé' by Professor Malintoppi (pp. 5–79); 'La fonction historique du droit international privé' by Professor Barile (pp. 305–76); and 'Principes généraux de droit international privé' by Professor Yasseen (pp. 387–465). The volume also contains an excellent study (pp. 95–171) by Professor Truyol y Serra of 'L'expansion de la société internationale aux XIX^{e} et XX^{e} siècles'. This seems to the reviewer to be one of the more impressive accounts of the origins of the modern law to have appeared for some time. Finally, there is a course by Professor Zemanek on 'State Succession after Decolonization' (pp. 187–298). This is an impressive analysis of the law and practice and can be usefully compared with the recent work of Professor O'Connell, *State Succession in Municipal Law and International Law* (1967). Professor Zemanek's views differ from those of O'Connell in several significant respects and to some extent his treatment might be thought to be more successful. Matters which are given careful examination include succession in relation to former protectorates after independence, lawmaking conventions, succession to the public debt and the concept of vested rights.

IAN BROWNLIE

British International Law Cases. Volume 6. British Institute Studies in International and Comparative Law, No. 1. London: Stevens & Sons Ltd. New York: Oceana Publications, 1967. xxvii+984 pp. (915 text and 66 pages index). £10. 10*s*.

The first volume and volumes two to five of the series were reviewed in this *Year Book*, 39 (1963), p. 494 and 41 (1965–6), p. 451, respectively. The principal subjects of this volume are diplomatic and consular agents (including also agents on special missions) and treaties. The collection of decisions on the operation and implementation of treaties is less than complete as a result of a lack of cross-references to the decisions in *Porter* v. *Freudenberg* and *Molvan* v. *Attorney-General for Palestine*, which appear elsewhere. The volume is the terminal one of the series as originally planned and contains a cumulative table of cases reported in all six volumes and an ample consolidated index. In his preface Dr. Parry informs the reader that the collection contains 710 decisions and that its 4,881 pages represent nearly 10,000 pages of the original reports. The preface also states that whilst the proposal to include cases on war and neutrality has been abandoned for the present, it is proposed to follow the present series up with a further two volumes containing a selection of comparable Commonwealth decisions, to be entitled *Commonwealth International Law Cases*. It is to be noted that the volume under review contains a substantial *addendum* consisting mostly of decisions on States as international persons but also including one decision on State territory and two on territorial jurisdiction.

IAN BROWNLIE

Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium'. Publications of the European Court of Human Rights, Series B.: Pleadings, Oral Arguments and Documents. Strasbourg: Registry of the Court, 1967. 612 pp. £3. 5*s*.

This volume contains the pleadings, oral arguments and documents previous to the decision of the Court on the preliminary objection of Belgium on 9 February 1967: see *Acts of the Court Nos. 5 and 6*. The materials are printed in English and French and there is a substantial index in both languages. The *Linguistic* case involves large issues relating to important substantive provisions of the European Convention and also concerning admissibility. In both respects the case raises the question of the reserved domain in a significant way. It is clear that the proceedings have importance for the future of complaints procedures of the type provided for in the European Convention, since States will be concerned to know to what extent their constitutional and political structure may become vulnerable as a consequence of accepting such machinery. The extensive collection of relevant material now published is thus of great interest.

IAN BROWNLIE

An Introduction to the History of the Law of Nations in the East Indies. By C. H. ALEXANDROWICZ. Oxford: Clarendon Press, 1967. viii+259 pp. £2. 8*s*.

In this volume Professor Alexandrowicz describes some of the main principles governing the law of nations in the East Indies in the sixteenth, seventeenth and eighteenth centuries. He thus carries a stage further the pioneer work he began with his lectures on International Law at the Hague Academy in 1960.[1] Modestly he does not claim for the present work anything more than that it is 'an introduction to the History of the Law of Nations in the East Indies, as the material relevant to the subject is too vast to allow more than the opening of a new field'.

Introductory though Professor Alexandrowicz's work may be, scholars of international law have not been slow to recognize its importance.[2] He has by now surely established his main point, which is that 'the way in which the development of the family of nations has been described in nineteenth- and twentieth-century treatises of international law calls for reconsideration' (p. 235).

The author stresses that the alleged need of the Asian States to become candidates in the nineteenth and twentieth centuries for admission into the Europe-based family of nations 'was brought about by doctrinal change, particularly by the abandonment of the natural law doctrine and adherence to positivism of the European brand'. Such doctrinal change, he says, 'cannot be presumed to have affected the status of Sovereign States, the presumption being offensive to the continuity of the family of nations', which continuity is provided for by the natural law doctrine of the classic period of the law of nations 'which offered a framework within which countries of different religion, race and civilization found their place side by side in a spirit of coexistence' (ibid.).

[1] *Recueil des cours* (1960–II), p. 207. See also 'Freitas *versus* Grotius' by the same author in this *Year Book*, 35 (1959), p. 162.

[2] See, for instance, Rosalyn Higgins, *Conflict of Interests* (1965).

It is possible to go a long way with the author in accepting this somewhat idealistic picture of the law of nations and agree with him that 'the so-called admission of Turkey, Persia, Siam, China and Japan into the family of nations in the nineteenth or twentieth centuries can hardly mean admission *sensu stricto* but constitutes at most an *inter-temporal* adjustment' (p. 240). It is not so easy to agree with him that even 'Asian communities which had lost their independence under European pressure but have now reappeared as independant States, may . . . consider themselves not as newcomers but as entities which reassumed their ancient membership in the family of nations' (ibid.). This may be true in some vague sociological sense, but from a legal point of view the realities of the colonial period can hardly be blurred in this way. Nor does it seem consistent with the Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960, that they should be.

The thesis that the nineteenth and early twentieth centuries witnessed not so much an 'expansion' of a European law of nations to the whole world—as it is so often put—as a contraction 'into a regional (purely European) legal system, abandoning its centuries-old tradition of universality based on the natural law doctrine' (p. 2) is, in this reviewer's opinion, substantially valid. But it is important to emphasize that the thesis is valid only to the extent that it is true. Convenient as such a thesis may be to the cause of mollifying divisions in the post-colonial period, an attempt to exploit it for that purpose would be folly. It is not suggested that Professor Alexandrowicz falls into this error, but the error seems sufficiently plausible and likely to be made for it to be necessary to issue a warning against it.

Since he delivered his Hague lectures, Professor Alexandrowicz has been confirmed in his main thesis by the way in which the International Court of Justice handled the Indo-Portuguese dispute, in particular by the Court's approach to the treaty concluded by the Portuguese with the Marathas in 1779. The Court, it will be remembered, found that treaty to be a fully valid international agreement, thus lending force to the view that the Maratha State at that time was an international person.[1] Nevertheless, it would be idle to deny that the Court found a certain difficulty in reconciling European notions of sovereignty with institutions such as *jagir* and *saranjam* which prevailed in India at that time and that, partly because of this difficulty in interpreting and applying the treaty, the Court found it easier to base such rights of passage as Portugal was deemed to possess on the more familiar ground of the customary practice which had grown up between two European colonial Powers (Portugal and Great Britain). This, it is necessary to repeat, does not invalidate Professor Alexandrowicz's thesis: it does, however, indicate that it would be unsafe to draw too sweeping conclusions from it.

The matters dealt with in the substantive chapters of the present volume are the following. First, there is the vital question of status or, as the author calls it, 'classification of sovereignty', considered both from the European and from the Asian point of view. Secondly, there is a lucid exposition of the controversy between Grotius and Freitas. Thirdly, treaties are considered, and under this head the author deals with the whole problem of unequal treaties, discrimination and capitulations. Fourthly, there is the problem of diplomatic relations, and here Professor Alexandrowicz demonstrates convincingly how much law can be learnt from historical accounts of famous missions such as that of Sir Thomas Roe to the Moghul Court (1615–19) and that of Lord Macartney to Peking in 1792. The volume concludes with a select bibliography and an index.

Professor Alexandrowicz has performed a signal service in opening up a new field

[1] *I.C.J. Reports*, 1960, p. 6.

of study. The question now is how should this aspect of the law of nations be further studied? It has already been suggested that the overriding consideration must be a fearless and consistent devotion to truth. This in turn indicates that the next stage might well be a more profound examination of the circumstances in which the universality of international law came to be undermined—in other words, a study of the nineteenth- and twentieth-century colonial period. A possible further stage would be to consider whether, if such serious distortions of the classic doctrine were permitted to take place in that period and to remain relatively unchallenged for so long, there may not be commensurate deficiencies in our own approach to contemporary problems which our successors will find equally strange. One advantage of the historical approach to international law is that it is apt to induce a measure of humility, and humility and scholarship seldom go ill together.

D. H. N. Johnson

The Indian Year Book of International Affairs, 1964, Vol. XIII, Part II. *Studies in the History of the Law of Nations*. Edited by C. H. Alexandrowicz. Madras: University of Madras, 1964, viii+261 pp. 15 Rupees.

This volume—a special Supplement to the *Indian Year Book of International Affairs* (1964)—consists of eleven papers on subjects connected with the history of international law. The initiative came from the Grotian Society which was founded in 1960 in order to revive 'the much neglected study of the history of the law of nations' and 'to give expression to the Grotian ideology with its equal emphasis on the positivist and naturalist outlook'. The Society, of which Professor Alexandrowicz is chairman and editor, has three groups, one in England, one in India and one in Australia, and this volume has been produced under the auspices of the Indian group, said to be the most active.

The first paper, 'Rationalism and Voluntarism in the Fathers of International Law', is by Professor O'Connell and provides a fitting introduction. The author insists that the controversy of 'reason versus will' as it appeared in the writings of Aquinas and Duns Scotus is relevant in international law today, particularly as it affects such questions as 'general principles of law' and the position of dissenting States confronted by rules formulated by a majority. He even doubts whether 'any serious philosophical contribution to the question of the cogency of the "general principles of law" has been made since the 17th Century' (p. 4) and he sees positive international law as the logical outcome of the philosophy of William of Ockham (1299–1349). From this he takes us briefly through the works of Suarez, Grotius and Pufendorf, culminating in the challenging conclusion that State practice is largely an illusion and that 'the attempt to found a legal system on what States do and have agreed to is to a great extent profitless' (p. 31). To be more specific, while conceding that rules such as those for the territorial sea may depend upon the assent of States, he insists that 'most international law is to be found in writings and in decisions of tribunals, and it is the cogency of the juristic or judicial reasoning, and not the agreement of State officers, that compels intellectual assent' (ibid.). Professor O'Connell quotes as examples of this the rules relating to denial of justice and succession to rights and obligations. Although some may find his paper too abstract, Professor O'Connell clearly demonstrates the relevance of philosophical training to the study of international law. Another paper along similar lines is that contributed by Dr. Ilmar Tammelo, who questions

'whether, without some progress in promoting commerce between the minds of lawyers of differing fundamental convictions and ways of thinking, the mere addition of new bodies of norms to the existing stock of international law will do more than increase the area of the traffic blockage which impedes the law of nations in performing its main tasks' (p. 229).

There are two articles on Gentili, one by Professor van der Molen who stresses the belief of the learned Italian jurist that the law of nations was a universal system, and the other by Dr. Simmonds on Gentili's least known work *De Legationibus*, in particular that part of the work where he discusses the qualities of the ideal ambassador. It is interesting that in that work Gentili, often hailed as a 'father of international law', went out of his way to defend Machiavelli, sometimes said to be the system's most distinguished opponent.

Professor Alexandrowicz, whose contribution to the history of international law is second to none among modern authors, writes on the attitude adopted by Georg Friedrich von Martens (1756–1821) towards Asian treaty practice. There is no doubt that von Martens was fully aware of that practice and, as Professor Alexandrowicz has himself shown, it affected European practice in various ways, e.g. relations between suzerains and vassals, commercial standards and capitulations. Developing his main theme, which is that in the eighteenth century the naturalist conception of international law began to be replaced by the positivist conception, Professor Alexandrowicz claims that von Martens 'could have welcomed' the availability of the Asian material and 'could have helped to salvage the idea of the universality of the law which was rendered precarious by the decline of the naturalist conception' (p. 60). The fact remains, however, that von Martens did not do this, being content to entitle his principal treatise *Précis du droit des gens modernes de l'Europe fondé sur les traités et l'usage*, and failed to draw 'any specific conclusions from the Asian treaty material which he had collected and included in his works' (p. 75). It would be interesting if the historians of international law could explain more fully this myopia, not merely of von Martens and his contemporaries, but also of their successors for a century or more.

Dr. O'Higgins contributes an interesting article on the history of extradition in British practice from 1174 to 1794, and Professor Quincy Wright traces the development of the concept of war. Both these authors are of course already well known for their work in these respective fields. Professor Paradisi relates international law to the social structure of the Middle Ages. He shows how most writers on international law proceed from the assumption of a national state whose sovereignty is exclusive both internally and externally. This, however, is not the position today any more than it was in the medieval period, so that an acquaintance with the law of nations in that period may help us in our understanding of some modern problems. Professor Berber writes on 'International Aspects of the Holy Roman Empire after the Treaty of Westphalia'. He shows that, although that Treaty, in Hegel's view, prevented Germany from becoming a modern State, the Reich nevertheless 'represented a higher form of international integration than the casual relationship of the European States under general international law' (p. 176). Germany became in fact 'a sort of United Nations' and, however much German nationalists may decry that period, it produced a great flowering of German culture which, according to Bryce, 'transcended the French hardly less than the Greek surpassed the Roman'.

In a convenient ensuing article Mr. Henry Strakosch examines 'The Place of the Congress of Vienna in the Growth of International Law and Organisation'. The whole trend of Professor Alexandrowicz's historical studies has been to emphasize the

importance of the shift from the universality of the law of nations based on natural law to a positive system deriving its existence from the absolutist national State. But, as against the familiar thesis that modern international law began in the sixteenth century with the Reformation and the Renaissance, there are strong grounds for holding that its development along modern positive lines ought to be placed much later than this. Mr. Strakosch is of this view, maintaining that even at the beginning of the nineteenth century natural law—of which the Holy Roman Empire was the 'institutional form'—was still the basis of the international structure. He concedes, however, that the Congress of Vienna, through such steps as the establishment of the Concert of Europe and its omission to re-establish an independent Poland, represented 'a decisive step on the road toward the creation of a positive law of nations' (p. 200) and was 'a necessary link between the natural law period of international law and its modern form of growing institutional consolidation' (p. 206). Coming nearer modern times Professor Starke writes on 'The Contribution of the League of Nations to the Evolution of International Law'. He classifies this contribution under two headings: first, the evolution of the law and practice of international organizations; secondly, the evolution of rules of international law generally, and especially in the science and technique of international legislation.

Although of a somewhat diverse character, the papers in this volume make a formidable and welcome addition to the literature upon the history of international law. It is to be hoped that the Grotian Society will bring out further such collections.

D. H. N. Johnson

Principles of Public International Law. By Ian Brownlie. Oxford: Clarendon Press, 1966. xxxi+646 pp. 63*s*.

Basic Documents in International Law. Edited by Ian Brownlie. Oxford: Clarendon Press, 1967. viii+243 pp. 25*s*.

Opening the pages of a new general treatise on international law may not be quite like first looking into Chapman's Homer, but it is nevertheless an exciting moment, for one sees the writer whole when he presents his views on the entire system of international law. The author reveals his theory of law, his priorities, his particular interests, his style and his political orientation in a completeness and depth that are not to be found in a book or books of more limited scope. And so one approaches Dr. Brownlie's *Principles* with an appetite whetted by anticipation of what is to come, as well as by recollection of the distinction of *International Law and the Use of Force by States*.

It is only proper to consider to what audience a general treatise is directed. The conciseness of Brierly gives it particular value as a starting book whether for the student or the lawyer or the layman. At the other extreme, the amplitude of Oppenheim or O'Connell makes these treatises basically reference books. Dr. Brownlie's volume of roughly 650 pages lies somewhere between the two. Although the author quite properly does not direct his work toward any particular audience, the dimensions of the volume and the availability of more extended treatises and reference books suggest that it will be found to be of particular value by students. This is not to deny the volume other roles but only to seek the function that it is particularly well equipped to perform.

The author declares at the outset that *Principles of Public International Law* 'is not a textbook or manual which says something about all aspects of public international law'. He goes on to say that 'A choice has been made of the more basic topics and, although a quantity of information is given, the treatment has been determined by the intention to present the subject matter in terms of law and legal technique' (p. v). Full or adequate treatment is accordingly given to the following major areas of international law, identified by the titles which they bear in the text: Sources of the Law; The Relation of Municipal and International Law; Personality and Recognition; Territorial Sovereignty; Law of the Sea; Common Amenities and Co-operation in the Use of Resources (ranging from economic aid and the peaceful uses of atomic energy through rivers, canals, and straits to extra-hazardous activities and problems of neighbourhood); State Jurisdiction; Rules of Attribution (essentially nationality); The Law of Responsibility; and The Protection of Individuals and Groups.

On the debit side, the basis of obligation in international law is left aside as being more appropriate to legal theory, although the sources of international law are thoroughly explored. International organizations and tribunals are dismissed in 23 pages and the judicial settlement of international disputes in 26 pages. A like amount of space is devoted to the law of treaties, which in this day is undoubtedly far more consequential in regulating the relationships of States than the number of pages concerning it would suggest. War and armed conflict are not touched upon, save by way of a few references to war crimes. And there are other smaller and less important topics that are summarily treated or left out entirely. Among these may be mentioned diplomatic and consular relations generally, diplomatic immunities, State succession (relegated to an appendix consisting of one paragraph and a bibliography), the nationality of ships and of corporations (by contrast with the extended discussion of the nationality of natural persons), United Nations Forces, and the European Court of Human Rights. On the other hand, the chapter on nationality, largely given over to the nationality of natural persons, is twice as long as the treatment of either treaties or international organizations, while the nationality of ships, the related problem of flags of convenience, and the national character of corporations are dismissed in a few paragraphs. The author's justification for carrying over a great deal of material from his article on nationality which appeared in this *Year Book* for 1963[1] is that 'the structural significance of nationality and its analogues is thought to justify a fuller treatment than is perhaps customary' (p. v). There is, on the contrary, reason to believe that in municipal law, in both private and public international law, and in the law of international organizations the 'structural significance' of nationality is in decline as the law looks to other significant linking factors between natural or juridical persons and the States that exercise jurisdiction over them, protect them, and speak for them internationally. But quite aside from this question, the 'structural significance' of treaties and international organizations in regulating the international legal order is immensely more important than that of nationality in linking individuals with States.

Rapid changes in international law and the proliferation of raw materials add to the burdens of writing a substantial book on international law. Dr. Brownlie is to be complimented on the range and timeliness of the references that he has used. The production by the International Law Commission of its final report on the law of treaties and the decision of the 1966 phase of the *South West Africa* case came as the manuscript was being completed and caused the author some difficulties, with the

[1] 'The Relations of Nationality in Public International Law', this *Year Book*, 39 (1963), p. 284.

result that there are mingled references to successive reports of the Commission and to various phases of this important case.

Almost all of what Dr. Brownlie writes is admirably clear and illuminated by appropriate examples. But there are points at which he pitches his ideas on too high a level of abstraction or compresses too much into one sentence. The student who begins his study of international law at the first page may encounter more than a little difficulty in following a discussion of sources which might give pause even to a person experienced in the field. 'In principle', Dr. Brownlie writes of treaties, 'the incidence of particular obligations is a matter distinct from the formal sources, but in practice the two things interact.' One would suppose that this is precisely the point at which the student, or other reader for that matter, should be led by the hand and should have the law explained to him in the most simple and direct terms. The problem is compounded here by the fact that the sources of international law cannot really be explained without an extended discussion of the basis of obligation in international law. As it is, the reader is required to accept international law as a legal system that impinges on the lives of States and of individuals but in a way or in ways that are never made quite clear. Similar opaque assertions occur from time to time in subsequent pages. Amongst the special types of personality are listed 'Legal constructions', defined in a one-sentence paragraph in the following terms: 'A State's legal order may be projected on the plane of time for certain purposes although politically it has ceased to exist' (p. 58). Or in speaking of the fact that the doctrine of abuse of rights finds limited support in the dicta of international tribunals, Dr. Brownlie says in an accompanying note 'Citations often involve *ex post facto* recruitment of arbitral awards' (p. 365, n. 6).

In a book of this size, there are inevitably many points at which one could quarrel with or question the precise wording of assertions or the appositeness of the authority adduced. An American reviewer may perhaps be pardoned if he draws attention to several matters relating to his country that should be set right. It would have been useful if there had been a more detailed analysis of the difference between the self-executing character of a treaty as a matter of international law and the self-executing character of a treaty when it is incorporated in municipal law, a matter which is normally left obscure in American writings as well (p. 45). A statement about the incompatibility of the views of the United States Supreme Court and of the Department of State on the immunity of State-owned trading vessels (p. 46, n. 5) is accurate only as ancient history. The International Claims Commission (p. 51) was replaced by the Foreign Claims Settlement Commission in 1954. The union does not act as 'agent' for the States in the conduct of foreign relations (p. 55). Whether by virtue of the principle of appurtenance or not, the United States does exercise jurisdiction over the airspace over the Panama Canal Zone, even though sovereignty in that territory remains in the Republic of Panama (p. 110).[1] The analogy of the St. Lawrence River to international straits (p. 243) is borne out only by some ill-founded contentions of the United States in 1824–6.[2] Although a footnote records that the *Incres Steamship Co.* case was reversed in the United States Supreme Court (p. 272, n. 1), the holding of the New York Court of Appeals is prominently mentioned in the text. It would be sufficient to mention that in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*[3] the United States National Labor Relations Act was held inapplicable to labour conditions aboard a foreign flag vessel that was already subject to the labour law of the State of the flag. On the jurisdictional immunity of a foreign State filing a counterclaim (p. 275),

[1] 35 *Code of Federal Regulations*, Ch. 1, Part 51 (1967).

[2] Baxter, *The Law of International Waterways* (1964), pp. 46–7.

[3] 372 U.S. 10 (1963).

the decision of the Supreme Court (*per* Frankfurter J.) in *National City Bank* v. *Republic of China*[1] deserves mention. It should be made clear that the 'absolute immunity' accorded by the United States to State trading vessels extends only to State-owned vessels actually in the possession of the foreign State (pp. 277–8), and *Republic of Mexico* v. *Hoffman*[2] might also have been mentioned. By the time of the publication of *Principles*, the *Sabbatino* case (p. 413) had been in effect legislatively overruled.[3] In the United States, contrary to what is said in the text (p. 421), a resident alien has no obligation to serve in local police forces. These matters are of trifling importance for a text addressed primarily to an English and Commonwealth audience, but their correction would lead to the book's being given a warmer welcome by the American friends of Dr. Brownlie.

Dr. Brownlie is not one to take tired doctrine on faith nor does he go to the opposite extreme of fervently embracing the social sciences or policy-oriented jurisprudence. He speaks with particular clarity and directness on a number of points that sometimes have not been seen clearly in the past. Particularly to be commended are his concise and perceptive observations on the relation of the succession and the continuity of States (pp. 76–9); collective recognition (pp. 90–1); the necessity of equating territory and jurisdiction for a number of purposes (pp. 106–7); the transfer of territory through acquisitive prescription, acquiescence and recognition, and estoppel (pp. 143–52); and the exhaustion of local remedies (pp. 403–10). The number of pages devoted to nationality (pp. 302–47) permit a much more thorough examination of this topic than is usually to be encountered in treatises on public international law. The one point at which Dr. Brownlie adopts a novel approach to the organization of material is in bringing together in a chapter entitled 'Common Amenities and Co-operation in the Use of Resources' a variety of topics linked by the common element of 'sharing'. A number of these, such as rivers, access to the sea by land-locked States, straits and the living resources of the high seas, are usually dealt with in the context of the law relating to territory or to the sea, and it is not clear that their association with economic aid, outer space, the peaceful uses of atomic energy and Antarctica is analytically useful, although it does provide a means of bringing together several topics for which it is otherwise difficult to find a home.

Inevitably in a book of this character there are choices of emphasis and of position to be made at various points. In making these Dr. Brownlie discloses, sometimes incompletely, sometimes obscurely, his own system of values, his own understanding of the rôle that law is to perform and his own sense of how the world should be ordered. He seems, for example, disposed to take a strict view of State sovereignty in a number of respects. He views with disfavour a restrictive theory of immunity that puts the trading activities of the State on a different basis from its functions *jure imperii* (pp. 281–3). International rivers are appropriately regulated by treaty. 'The classical principles of "international fluvial law" in the decisions referred to tend to reflect policies of economic liberalism and the "open door", in other words, penetration by powerful outside interests, often as a result of peace treaties' (p. 239). The Black Sea and Baltic Sea are, it would seem, open seas only 'from acquiescence and special agreements on access' (pp. 207–8). On the other hand, States are subject to certain far-reaching duties. There is probably 'a collective duty of member States [of the United Nations] to take responsible action to create reasonable living standards both for their own peoples and for those of other states' (p. 227). Self-determination is a

[1] 348 U.S. 356 (1955).

[2] 324 U.S. 20 (1945).

[3] Foreign Assistance Act of 1964, § 301 (d) (4), 78 Stat. 1012 (1964), subsequently re-enacted as permanent legislation.

legal principle and may mean *inter alia* that 'intervention against a liberation movement may be unlawful and assistance to the movement may be lawful' (pp. 483–5). It is suggested that there is a substantial body of *ius cogens*, which may go so far as to include the United Nations Declaration on Permanent Sovereignty over Natural Resources and the United Nations Convention on Racial Discrimination (p. 417). On the other hand, the attempt to formulate a 'human rights' standard for the treatment of aliens, as suggested by Dr. Garcia Amador, is rejected with extreme suspicion (pp. 427–8). The United Nations comes in for its share of criticism, for 'with the approval of the Court' its organs 'have interpreted the Charter in accordance with the principles of effectiveness and implied powers at the expense, it may seem, of Article 2, paragraphs 1 and 7' (p. 253). Dr. Brownlie criticizes the assumption of peace-keeping functions by the General Assembly, as in the creation of the United Nations Emergency Force in 1956, and finds unsatisfactory the reasoning of the International Court in the *Expenses* case (pp. 540–1). He is equally critical of the notion of 'implied powers' that was applied in the *Reparation* case (pp. 526–7).

Treatises are blessed with a long life expectancy and renew themselves through revisions and new editions. It is much to be hoped that Dr. Brownlie's *Principles of Public International Law*, so auspiciously launched into the world, will grow and flourish. In particular, its expansion into two volumes would permit the author to give adequate scope to those topics that the confines of one volume required him to omit or to treat summarily.

Basic Documents in International Law is not a supplement to *Principles*, but can readily be used in conjunction with it. The documents, consisting of constitutional instruments, treaties and declarations of the General Assembly, are ranged under the headings of International Organizations; The Law of the Sea; Outer Space; Diplomatic Relations; Permanent Sovereignty over Natural Resources; Human Rights and Self-Determination; Law-Making; and Judicial Settlement of Disputes. Each of these parts is preceded by a short explanatory note, incorporating a select bibliography. There is no room for cases in a book of this size, and the editor has wisely confined its contents to treaties and resolutions of the General Assembly, probably the two most important modern sources of international law. All in all, this selection of documents gives an admirably contemporary view of international law.

R. R. Baxter

Le Gouvernement des juges dans les Communautés Européennes. By Jean-Pierre Colin. Paris: *Librairie générale de droit et de jurisprudence*, 1966. 544 pp. No price stated.

This book is a useful and interesting addition to the already substantial literature on the Court of Justice of the European Communities.

The first eighty pages of the book are introductory, dealing with such matters as the Supreme Court of the United States, the *Conseil d'État*, and the history, structure and legal nature of the European Communities. This helps to set the Court in its general context, although some readers may feel that the author has cast his net unnecessarily wide. What is undeniable is that he has not read widely enough to give a comprehensive account of such general topics; throughout the book he refers only to sources in French, apart from a mere handful in English. This may not matter much in other parts of the book, but it does seem odd to base a description of the United

States Supreme Court mainly on French materials, or to discuss the legal nature of the Communities (international organization or embryonic federation?) without making any reference to the torrent of Italian writings on the subject.

In the first main part of the book (pp. 81–300), the author picks out the chief functions of the Court and analyses them under four general headings—the interpretation of the constituent treaties, international jurisdiction, constitutional jurisdiction and administrative jurisdiction. This is the most successful part of the book. Relying on an extended discussion on the Court's judgments, the author strikes an admirable balance between principle and detail, between the theoretical and the practical. In a sense, the book is much more than a work on the Court; it opens up perspectives on many different aspects of the Communities, viewed from the angle of the Court. For instance, the section on the constitutional functions of the Court deals with such matters as the balance of power and the delegation of powers in the E.C.S.C., the revision of the constituent treaties and the emergency powers of the High Authority. The only criticism which can be made is that the author, in the section on the Court's administrative jurisdiction, does not adequately show the precise meaning to be given to technical terms like *détournement de pouvoir* and *faute de service*. Even if such terms possessed the same meaning in the constituent treaties as in French law (which is itself an unduly optimistic assumption), this omission would still limit the book's utility to readers unfamiliar with French law.

The second part of the book examines the policy followed by the Court in its judgments in four main fields—the fixing and publication of coal and steel prices, the equalization of the price of scrap-iron, restrictive practices in the E.C.S.C., and transport policy in the E.C.S.C. This part of the book is devoted exclusively to the E.C.S.C., but even in other parts of the book the author gives far more space to the E.C.S.C. than to the other two Communities. To some extent, this is inevitable in a book which relies so heavily on decided cases, because, for various reasons, the Court has decided far more cases under the Treaty of Paris than under the Treaties of Rome. Nevertheless, one suspects at times that the book was originally written as a doctoral thesis in about 1960, and reluctantly brought up to date since then. It is a pity that the author does not pay more attention to the E.E.C., which is of much greater political and economic importance, because the second part of the book, like the first, demonstrates his ability to give a clear analysis of complex legal problems and of the no less complex interrelation between law and economic policy.

The author's picture of the Court is impressive because he devotes so much attention to the political and economic background. But a faulty sense of perspective leads him at times to attribute excessive importance to the Court. He is rather too ready to assume that resemblances between the Court of the Communities and the United States Supreme Court are proof that the Communities possess a federal character. He overlooks the fact that the constituent treaties of the Communities are more detailed than the United States Constitution, which means that the Court of the Communities enjoys less freedom of interpretation than the United States Supreme Court, and is less likely to be accused of practising 'government by the judiciary'. Its role is essentially the preservation of the balance of power established by the constituent treaties—an important function, no doubt, but it is difficult to agree with the author that the Court thereby becomes the centre of power in the Communities, for political power in any meaningful sense must surely include the power to change as well as the power to preserve. (The author's heavy emphasis on the E.C.S.C. may have much to do with his ideas about the importance of the Court and the federal

nature of the Communities; not only is the E.C.S.C. more 'supranational' than the other two Communities, but the Court has a more active role to play under the Treaty of Paris, particularly under Articles 37 and 95). However, although the author's ideas are questionable, they are also very thought-provoking, which is just what they should be in a book of this sort.

Misprints are numerous and there is no index. MICHAEL AKEHURST

Gedächtnisschrift Hans Peters. Edited by H. Conrad, H. Jahrreiss, P. Mikat, H. Mosler, H. C. Nipperdey, J. Salzweder. Berlin, Heidelberg and New York: Springer-Verlag, 1967. xii+985 pp. DM 98 (U.S $24. 50).

Few contemporary German scholars can have a greater claim to be remembered in gratitude for both their achievements in the field of legal scholarship and the strength of conviction shown by them under most difficult circumstances than Hans Peters. During the period of the decline of the Weimar Republic he was one of the outstanding defenders of the existing democratic order against the onslaught of the forces of darkness. As late as in 1933, when everyone knew that the battle for liberty was lost, he cast aside all considerations for his personal safety and entered the political scene as a member of the Prussian Diet for the Centre Party, whose cause he had defended in 1932 with skill and forthrightness before the Supreme Court in the *cause célèbre* resulting from von Papen's *coup d'état*. Even during the period of oppression he dared to voice his opposition to the totalitarian state and its principles, not only in his writings, but also as an active member of the resistance group formed by the 'Kreisauer circle'. After 1945 he became Professor at the Humboldt University of Berlin; but the new regime prevailing in the Eastern Sector of the German capital proved to be as incompatible with his conceptions of human dignity and personal liberty as had been its predecessor before 1945. As Professor at the University of Cologne since 1949 he rendered important services to the Federal Republic by his numerous contributions—academic as well as practical—in the fields of constitutional and administrative law and held a large number of important positions on the boards of scientific organizations. A convinced Roman Catholic, he earned the love and admiration of many, who shared neither his religious nor his political convictions, by his unwavering tolerance, his constant defence of human rights and—last not least—by his very great personal charm.

The present memorial volume was originally planned to be a jubilee volume on the occasion of Peters's seventieth birthday. His sudden death in January 1966, which deprived him in particular of the possibility of completing the manuscript of a textbook on modern German constitutional law, frustrated this intention. The long list of names of those who contributed constitutes an eloquent testimonial to the range and importance of his scholarly interests as well as to the large number of his friends, pupils and admirers. With the sole exception of private law there is no single field of legal scholarship that is not represented here. In addition to some fifty German authors, among whom figures the Federal Chancellor himself, Professors from Austrian, Swiss, Dutch and Japanese universities are represented. The list includes, significantly enough, some whose record during the period from 1933 to 1945 can have given little pleasure to one of Peters's convictions.

It is, of course, quite impossible to mention within the space of a review even the more outstanding ones among these essays, some of which are veritable monographs

on problems of major importance, as, for example, Professor Habscheid's article on the relationship between the right of privacy, on the one hand, and the finding of the truth in legal proceedings, on the other. Readers of this *Year Book* will presumably be particularly interested in the international law side of the volume. In this field pride of place may well be given to Professor H. Kipp's article on intervention by force in contemporary international law. The learned author shows convincingly that Article 2, paragraphs 1 and 7, of the Charter of the United Nations cannot any longer form the basis of any satisfactory solution of this problem and that the existence of the Soviet doctrine of international law, which justifies every intervention into the internal affairs of a State, provided it favours a communist cause, is itself a factor which no interpreter of existing international law may disregard. His discussion of the problem of the Jordan river waters is a model of an approach which combines scholarly care with a realistic appreciation of the much abused concept of 'aggression'. Professor Seidl-Hohenveldern in his short, but most interesting, article on the immunity of foreign States in criminal and administrative proceedings, comes to the conclusion that this should be restricted to acts *iure imperii* and demonstrates once more how far the English rule in this field is removed from contemporary thinking except from that prevailing in the Communist countries. Two articles (by Professors Huber and Klug) deal with the relationship between the European Convention on Human Rights and the constitutional guarantees provided for in most Western European countries. The idea of looking at the legal problem of German unity through the mirror of the special legal situation of Berlin is common to the thoughtful essays contributed by Dr. Helmut Brandt and Professor Ermacora. It is, however, deplorable that the extensive study by these authors of the copious literature on the legal position of Berlin has not prevented them from overlooking the articles on this problem by J. L. Simpson, Lush and—last not least—by Professor M. Bathurst in vol. 38 of this *Year Book*. International criminal law is the subject of an article by Professor Oehler, who deals critically with the treatment of the accessor to a foreign crime in the new German Draft Code. The history of international law receives a valuable contribution from the pen of Professor E. Seidl, who demonstrates how imperial Rome exercised the art of statesmanship in the manner in which it incorporated small countries into the Roman Empire. Professor Jedin's attractively written essay on the law relating to legations at the Council of Trento is perhaps of more immediate interest to ecclesiastical lawyers, but has also an obvious bearing on the history of international law and diplomacy.

The volume is opened by an obituary from the pen of Professor Friesenhahn, which in frank and fitting terms describes the life and achievements of Hans Peters. A complete bibliography gives an indication of the truly enormous range of Peters's work and interests. That he was prevented from harvesting the last fruits of his scholarly endeavours by his untimely death must remain a matter for deep regret.

E. J. Cohn

Legal Aspects of International Lending and Economic Development Financing. By Georges R. Delaume. Parker School of Foreign and Comparative Law. New York: Oceana Publications, 1967. 346 pp. $15.00.

This book is not another Mann or Nussbaum, in the sense that it does not purport to deal with the whole range of legal problems connected with money and financial transactions. The author has pursued the related but distinct objective of examining

the 'new legal patterns and contractual trends' which have evolved as a concomitant of 'the unprecedented growth of economic development lending', in particular since 1945. Despite the bewildering variety of modern loan transactions, some of which, as he points out, may require unique treatment by draftsmen, a 'common background of legal thinking' may be discerned. Gone are the days when the concept of 'sovereignty' could be regarded as diluting the binding character of a public debt. Gone also are the days when lenders might rely upon public policy and related legal weapons 'to limit the damaging consequences of exchange restrictions'. The new law in this field, flowing from Article VIII, Section 2 (*b*) of the I.M.F. Articles of Agreement, is expounded in a fascinating and illuminating chapter.

The book is divided into two parts: the general legal framework of international loans, and special risks and available legal remedies. The essence of Part I is contained in Chapters III and IV which deal, respectively, with the complex of questions subsumed under the rubric 'proper law', and with the problems of jurisdiction, arbitration and enforcement of awards. Loans concluded by international persons usually expressly stipulate the applicable law. The author takes the view that loans to member Governments by I.B.R.D. are governed by international law, as are the guaranteed loans made by the Bank to a public or private entity and guaranteed by a member Government. A curious statement is made concerning loans by the Inter-American Development Bank which is authorized to conclude transactions similar to those of the I.B.R.D. Delaume suggests that in view of the variety of these financing operations the I.A.D.B. 'may find it convenient to resort alternatively to public and *private international law*' (p. 85; italics added). If by this he is characterizing private international law as a legal system capable of governing loan agreements (which would seem to be the meaning from the context), one would wish for a reasoned exposition of the somewhat startling assumption that private international law is itself a system of substantive rules, capable of selection as the proper law. However, it may be that error has crept in here and that the author meant 'resort alternatively to public international law and *private law*.' The number of obvious literal errors noticed by this reviewer is unfortunately high, so that questions of this sort do arise, and mar the essential accuracy of a work which is both a scholarly analysis and a specialized practitioners' manual. A comma misplaced in a quoted clause from a loan agreement may (and does in this instance) crucially affect the interpretation (p. 77, at note 15); on other pages we are referred to the 'law of its *plan* of incorporation' (p. 97), and to placing weight upon 'the governmental *charter* of the borrower' (p. 102). There is even an example of the word 'debtors' appearing when 'creditors' was meant (p. 315, note 3).

In the absence of express stipulation of applicable law in loans between private and international persons Delaume argues convincingly that a tribunal is free to select public international law as the governing law. Where the rights and obligations under an international loan agreement are assigned to private persons he submits, taking issue with Dr. Mann, that the post-assignment relations are governed by some municipal system and no longer by international law. Delaume also rejects Dr. Mann's view that a debtor government which amends its law so as to interfere with its contractual obligations commits no 'breach' or tortious act if the loan contract is governed by the debtor's law. The issue is whether a change in the proper law can be reconciled with the debtor's international obligations. To remit this matter to the proper law is to beg the question. On the circumstances in which the enactment of inconsistent law amounts to a breach of international obligation, Delaume confines himself to a rejection

of the *pacta sunt servanda* 'school' and supports the 'acquired rights' approach, but with emphasis upon the particular facts of each case.

Chapter IV, 'The Quest for a Forum', discusses the essence of the sovereign immunity problem, with ample citation of authority. The vexed, but rarely occurring, problem of the execution of an arbitral award against a State or government is examined in the context of jurisdictional and procedural conflict rules. The enthusiasm aroused by Article 54 of the I.B.R.D. Investment Disputes Convention (p. 210) might have been tempered by mention of the following article which provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity from execution of that State or any foreign State.

Part II begins with a chapter on secured and guaranteed loans, including assignment of revenues and the purpose and effect of negative pledge clauses. Chapter VI, 'Maintenance-of-Value Clauses', leads the reader with admirable clarity through the maze of gold clauses, currency options, European Units of Account (not to be thought of as a gold clause in disguise) and the canons of interpretation used to ascertain whether indeed the parties intended to contract on a maintenance-of-value basis. Chapter VII on exchange controls has already been referred to. The main effect of the 'new law' has been that no responsible lender or borrower would now consider concluding a loan without being satisfied that all relevant exchange control authorities have given it their approval. Problems arise only in contracts between individuals. The array of devices used in attempts to secure the lender against unfavourable changes in exchange control regulations, including the undertakings required by the I.B.R.D. and other international lenders, are compared and, as throughout the book, fully illustrated with examples from recent transactions. The final chapter, on political risks, is briefer, but this is a field well covered in the literature. Problems arising from changes in the form of government, State succession and the outbreak of war are succinctly stated and the basic legal principles given.

The lack of direct experience in the heady atmosphere of international finance begets in this reviewer a reluctance to assess the value of this book to the practitioner, whether lawyer, banker, financial consultant or civil servant, save to observe that there would appear to be no legal aspect of international loans which is not touched on, and that the major problems are fully explored by a method which garners material from loan agreements, judicial decisions, international treaties and other writers, subjects it to critical analysis and attempts to extract guiding principles. The principles, whether they are firmly established in municipal law or in private or public international law, or are offerings by the author *de lege ferenda*, are tested by reference both to the extreme case and to the usual situation. If one is not always convinced of the validity or desirability of the author's suggestions, one can only admire the thoroughness of his *travaux préparatoires* and the remarkable analytical skill which he brings to bear upon the problems.

GILLIAN WHITE

Essays on the Law of Treaties. By INGRID DETTER. Published under the auspices of the British Institute of International and Comparative Law. Stockholm: P. A. Norstedt & Söners Förlag; London: Sweet & Maxwell, 1967. 118 pp. £1. 17*s*. 6*d*.

These essays were originally prepared as a basis for a lecture course on the law of treaties and their publication in book form embodies both the merits and deficiencies

of the traditional teaching medium. On the positive side, the essays present a brief, clear account of the present position on seven major aspects of treaty law. They will provide the student, deterred perhaps by the bulk of Lord McNair's standard work, with a useful introduction to the subject. On the other hand, Dr. Detter has not been able to treat most of her topics in any depth and much of the book will make very familiar reading for other than the newcomer to this field.

The seven essays deal in turn with the forms in which consent may be given; entry into force; registration; reservations; revision; termination and effects upon third parties. Considering that the lectures were delivered in 1967, it seems surprising that the book is not more closely cross-referenced to the draft articles produced by the International Law Commission. Though a few references are made to various Reports of the Commission, the reader will look in vain for any critical assessment, other than by implication, of the draft articles which may, after all, shortly terminate such old controversies as those over reservations to multilateral conventions, the effect of treaties upon third parties and the *clausula rebus sic stantibus*. Thus, on page 99, Dr. Detter comes to the conclusion that the latter doctrine must be dismissed as a separate ground for termination of treaties but fails to comment on the Commission's draft article on 'Fundamental change of circumstances' which is clearly at odds with her conclusion.

Differences of opinion will exist on some points. Thus, it may perhaps be thought that the emphasized distinction between a *pactum de contrahendo* and a *pactum de negotiando* (pp. 14 and 72) is rather strained. In both cases, the same obligation would seem to exist—to pursue negotiations in good faith as far as possible with a view to concluding an agreement. Again, in discussing the fact that simultaneity of signature is no longer required, it seems rather curious to choose signature of the Optional Clause of the Statute of the International Court of Justice as an example. In general, however, teachers will welcome this collection as a sound introduction to this branch of the law.

E. D. Brown

The Structure of United Nations Economic Aid to Underdeveloped Countries. By Üner Kirdar. Preface by R. Y. Jennings. The Hague: Martinus Nijhoff, 1966. 361+xxv pp. (including Bibliography and Index). Fl. 43.50

It is fortunate that an author with Mr. Kirdar's good sense, diligence and gift of exposition, and with his experience as member of the Turkish foreign service, should have undertaken to study United Nations economic aid, a subject the academic analysis of which is not easy for a lawyer. Mr. Kirdar, however, is not a theorizing, 'conceptual' jurist. Though he holds strong views on the philosophical justification for international aid and on methods and forms that should be used for it, his approach to its existing legal and administrative manifestations is practical and pragmatic. Moreover, where required in order to obtain a comprehensive view of his subject, he does not shun the discussion of its political and economic aspects. As a result, his book is informative, invariably lucid and often persuasive in its strictures and conclusions.

In its *first part* (some 80 pages), the author deals with United Nations *technical assistance* activities. As it was written a few years ago, his account of their organization is no longer up to date after the recent merger of the Expanded Programme and the U.N. Special Fund in the U.N. Development Programme. Yet it not only accurately describes elements of the original machinery which have been retained—e.g. the

Resident Representatives—but explains an essentially empirical administrative evolution without which the existing structure cannot be properly understood. It also serves as background to two topics of special interest to the international lawyer.

The first concerns the general agreement (the 'Basic Agreement' or the 'Revised Standard Agreement') entered into by the United Nations and the specialized agencies concerned with each recipient State, and the programmes of specific operations (originally, the 'Supplementary Agreements') which are agreed within its framework. Mr. Kirdar considers the former an instrument governed by international law, while programmes are, in essence, administrative arrangements devoid of legal character (p. 59). He does, however, describe Programmes of Operations of the U.N. Special Fund as 'contracts' (p. 222).

The other topic meriting special attention is the legal position of O.P.E.X. officers, i.e. of experts whose services are provided by a United Nations agency to the recipient Government under whose exclusive directions they perform their duties. It is not wholly reassuring to learn that the responsibility of the employer government under the Basic Agreement for the acts of such officers may be limited by mutual accord between that government and the United Nations agency concerned without assumption by the latter of a corresponding responsibility for such acts.

The *second part* of Mr. Kirdar's study (about 200 pages) deals with the *financing of economic development* by United Nations agencies—the World Bank, the I.M.F., I.F.C., I.D.A. or the U.N. Special Fund—as well as with certain recent institutional developments in this field (such as the World Food Programme, U.N.C.T.A.D. etc.). It also contains an interesting chapter on bilateral economic aid—of which, as a *method*, the author strongly disapproves—and on regional economic assistance—including the E.E.C. Development Fund, the O.E.C.D. and the Inter-American Development Bank (wrongly described as the 'Inter-American Bank').

Most of these institutions have been the subject of detailed studies, though a handy single volume with a reliable and *brief* résumé of the history and constitution of each of them has, of course, its uses, Its true value, however, lies in the legal analysis of the financing techniques employed by the agencies—the loan and guarantee agreements of the I.B.R.D.; the exchange transactions and stand-by arrangements of the I.M.F.; or the investment agreements of the I.F.C.

Operations of the I.F.C. are, as the author rightly states, carried out under national and private or commercial laws (p. 193). On the other hand, the loan agreements of the World Bank, registered with the United Nations under Article 102 of the Charter, are now generally considered as instruments governed by international law (p. 141); the author expresses the same opinion—though perhaps not quite with the same emphasis—in respect of the Bank's guarantee agreements (p. 143). His view that stand-by arrangements of the I.M.F. are of the same nature and that they contain legal '*undertakings*' of the beneficiary regarding its economic policies (pp. 162/3), should not go unchallenged. The Fund has carefully refrained from giving such arrangements, and in particular the accompanying declaration of *intent* by the beneficiary concerning its policies, the form of treaty obligations. In doing so, it has been actuated by the desire to avoid both that the proposed economic programme should be considered as anything but the beneficiary's statement of its own policies and that non-compliance with that programme should be deemed a breach of a treaty obligation. This kind of motivation for the form of actions of international economic organizations is not uncommon and contributes to their effectiveness. Besides, the stand-by arrangements of the I.M.F. are not registered under Article 102. In fact, their full text is not

published. In the circumstances, they can hardly be classified as international agreements governed by the rules of international law.

Mr. Kirdar's general assessment of the value of economic aid at present could hardly be more damning. Were it necessary, he says in his *Retrospect and Prospect* at the end of the volume, to evaluate the efforts made, 'one could simply describe them as the most tragic failure of our epoch' (p. 300). Because of its world-wide range the intensity and effectiveness of United Nations technical assistance remain low (p. 93); the specialized agencies 'are too much inclined toward functional particularism and too little co-ordinated' (p. 304). But the author's most vigorous strictures are reserved, not for the United Nations, but for its members which use their aid effort as an instrument of foreign policy and promotion of their exports (pp. 305, 307, 311)—a motivation which he rejects on ideological as well as practical grounds. Thus, he would like a legal obligation to render economic aid to be recognized as part of modern general international law. 'Internationalism, like nationalism, must become social' (p. 329).

It is not surprising that Mr. Kirdar, opposed to bilateralism as a method, not only favours multilateralism but supports the idea of a world development authority for the assessment of compulsory aid contributions, their allocation, distribution and administration. Indeed, he presents the reader with an outline of an U.N. Development Authority—Governing Board, President, General Council and all, together with a Special Court which, among others, would have jurisdiction over private foreign investment disputes. To the reviewer such a scheme does not commend itself because of its excessive centralization and the implicit inefficiency, ineffectiveness and duplication of effort.

Reliable statistics amply quoted by the author (cf., e.g., pp. 36, 301, 303) certainly prove that, in relation to the size of the problem, present aid programmes are inadequate and that inequalities between poor and rich nations, and consequently international problems arising out of their co-existence, are growing—'this central crux', as Professor R. Y. Jennings calls them in his Preface (p. vii). Economic aid on a scale commensurate to the need therefore, rendered in pursuance of a commonly recognized legal obligation, would evidently go a long way towards their solution—by no means the *whole* way. Yet this hope is hardly for the world *today*. Faced with the spectacle of political campaigns and constitutional processes that determine the shape and size of economic aid in each capital exporting country, and of the stresses and strains caused in each of them by its own social disparities, Mr. Kirdar the *diplomatist* will certainly not throw up the sponge but continue with his daily efforts to obtain a greater volume of aid—both multilateral and bilateral—better co-ordination and higher effectiveness within a system that is pluralist in its concept. Personally, he may even find that with all its frustrations the work is morally and intellectually rewarding. In the meantime, Mr. Kirdar the *scholar* and *reformer* must press on, for *tomorrow*, with his claims for the realization of a higher standard of social justice in international law.

ALEXANDER ELKIN

International Claims: Postwar British Practice. By RICHARD B. LILLICH. Syracuse University Press, 1967. 192 pp. $6.30.

This is the latest volume written by the editor of *The Procedural Aspects of International Law Series* published by the Syracuse University Press. It is not only

a most valuable examination of the British practice in dealing with international claims since 1945, but also an important contribution to a clarification of the many new legal problems to which this practice has given rise.

In seven chapters Professor Lillich examines first the general principles governing the British Claims Practice since 1945. He explains the reasons for the enactment of the Foreign Compensation Act 1950 (14 Geo. 6 Ch. 12) and the establishment of the Foreign Compensation Commission, its composition and the main principles and rules of its procedure.

In the next five chapters the jurisprudence of the Foreign Compensation Commission is analysed in great detail. The second chapter deals with eligible claimants and considers separately individuals, partnerships, corporations, stockholders, trustees and other claimants like Executors or Administrators of claimants who died before an award was made.

The question of eligible claimants was not always resolved in the same manner in the various Orders in Council governing the jurisdiction of the Foreign Compensation Commission and Professor Lillich's clarification of these differences and the wealth of material he produces to show how the Commission resolved the problem of eligibility of claimants under the various orders will be of the greatest assistance to all who either as draftsmen of similar legislation or as practitioners before Claims Commissions will have to concern themselves with questions of the eligibility of claimants. Professor Lillich rightly points out (p. 30) that the wider eligibility alternative offered under the Czechoslovak Order in Council [1950] Stat. Instr. 772 (No. 1191), was a solitary departure from the traditional rule that only those claimants are eligible who are British nationals on the date of the relevant measure of nationalization and at the date of the signature of the Compensation Agreement.

In the question of dual nationality few difficulties arose because—as the author shows (p. 32)—dual nationality rarely became a bar to eligibility under global settlement agreements. Only in the case of Yugoslavia, which under its nationalization laws specifically exempted from their reach the property of emigrants who had acquired a foreign nationality without discharge from Yugoslav nationality, was it required by the Commission that the claimant shows that he had taken appropriate steps to obtain such discharge. It seems to follow that where no such specific provisions as to dual nationals are enacted in the nationalization legislation (as, e.g., in the case of Czechoslovakia) no evidence of discharge from that nationality should be required and was in fact not required by the F.C.C. provided the claimant had the valid nationality under the municipal law of the State which concluded the compensation agreement with the State of the claimant's original nationality. On pages 36–52 Professor Lillich discusses corporations as eligible claimants. Here he points out the great differences between the United Kingdom practice which on the whole regards a British incorporated company as entitled to compensation irrespective of who its shareholders are, a practice questioned by some American authors like Rubin ('Nationalisation and Compensation: A Comparative Approach', *University of Chicago Law Review*, 17 (1950), pp. 458, 468) with whose views Professor Lillich agrees. He prefers the American practice which generally requires that 50 per cent. or more of a corporation's outstanding stock is owned by American nationals. Very helpful are the author's clear distinctions in the treatment of 'direct' and 'indirect' claims of stockholders under the various Orders in Council.

On pp. 60 to 75 Professor Lillich discusses the types of claims which the lump-sum agreements settled and the methods used by the Commission for the distribution of

the available sums under the various Orders. Particularly here and in the discussion of creditors' claims and war claims Professor Lillich succeeded in collecting most important and otherwise hardly accessible case material.

On pp. 112–28 the method by which damages are awarded under various Orders is considered and the differences in the valuation methods adopted are clearly analysed and supported by reference to individual cases decided by the Commission. The best part of this chapter appears to be the one on the valuation of goodwill (pp. 120–5). Unlike the American Foreign Claims Settlement Commission the British Commission includes generally goodwill in assessing damages. Professor Lillich cites from a note of the Legal Officer of the F.C.C. (p. 120) that 'the general practice of the Commission is to value goodwill at 3 years profits average', adding that in certain cases—according to the evidence—a multiple higher or lower than three could be adopted.

A review of Professor Lillich's book should particularly concentrate on his concluding chapter (pp. 129–42) in which he evaluates the British Claims Practice since 1945. Professor Lillich distinguishes the 'settlement process' which is the responsibility of the Foreign Office and the 'adjudication process' which is carried out by the Foreign Compensation Commission. He rightly stresses that very large claims of British nationals have been waived in the settlement agreements and that with the exception of the Egyptian agreement there has been very little parliamentary debate on the adequacy of the compensation received. But Great Britain has not—like the United States—used blocked assets of foreign countries to induce them to a more favourable settlement. The fact that the British Government supplied additional funds to improve the Egyptian awards is rightly considered to be no precedent for future unsatisfactory settlements although there is strength in the argument advanced by Professor Lillich that claimants should 'not have to pay exclusively for foreign policy benefits supposedly achieved for the entire body politic by the partial waiver of their claims' (p. 137). Another difference between British and United States settlement practice which is pointed out consists in the exclusion of certain claims in some British agreements which the claimants concerned were able to settle themselves more favourably than if they were included in the general lump-sum agreement. One such case is that of the Shell Oil Company which succeeded in obtaining a better settlement with Egypt because it was able to offer Egypt commercial advantages not otherwise available.

Professor Lillich is somewhat critical of the fact that the prerogative power of the Crown over the settlement process extends to the adjudication process and was used to reverse some decisions of the Foreign Compensation Commission, a practice which is unknown in the United States. He rightly concludes therefore that the British awards are a much more accurate reflection of the Government's position than are the American awards. Professor Lillich would welcome it if the British Commission were permitted 'to look directly to settlement agreements and customary international law for its legal standards' (p. 141). It is difficult to accept this view without some qualification. The British practice, by being based on municipal law, seems on the whole to assure a much more certain and consistent adjudication process than the one based on the interpretation of international agreements and on customary international law. None the less, in spite of these severe restraints on the jurisdiction of the British Commission, the author acknowledges that it contributed to the development of the law of international claims as, for example, in its allowance of the claims by dual nationals and in the area of creditor claims which are not generally recognized as claims under traditional international law. Such creditor claims were extended by the Foreign Compensation (Czechoslovakia) (Registration) (Amendment) Order 1961

(Stat. Instr. No. 585) not only to claims of British nationals, but even to those who without being British nationals were 'between the 3rd September 1939 and 1st November 1945 resident or carrying on business in the United Kingdom', and to claims of British nationals 'affected by the Czechoslovak Monetary Reform Law No. 41 of 1953' to which the author draws attention on p. 142 (note 74).

The detailed comparative and always stimulating analysis of the British Claims Practice since 1945 will make Professor Lillich's book one of the most important contributions to the literature on the subject of the settlement and the adjudication of international claims.

ALFRED DRUCKER

International Law in Australia. Edited by D. P. O'Connell. London: Stevens & Sons Ltd. 1965. xliii+603 pp. £5. 10*s*.

This book consists of twenty-one essays on various aspects of international law, considered in an Australian context or from an Australian standpoint. It was produced, under the editorship of D. P. O'Connell, by a number of academics working, with one exception, at Australian universities, and by several individuals in the Commonwealth public service.

There are obvious problems in compiling a work of this type, and no editor could approach his task with confidence. In the first place, as the reviewer understands actually occurred over the section dealing with the law of the sea, it might be that the person approached to deal with a particular topic will not be free to undertake the commitment. Much time will be spent on finding a replacement, and, in the last resort, the editor will be obliged to fill the gap as best he can. In this case the editor made use of the excellent Roy Milne Memorial Lecture given in 1959 by Sir Kenneth Bailey, a former Commonwealth Solicitor-General, and added an extra chapter on Australian Coastal Jurisdiction, drawing mostly on materials he himself had used in a similar article in this *Year Book*.[1] While one has some sympathy for the editor, it is nevertheless unfortunate that he did not do more to bring the Lecture up to date. It covers little that has occurred since 1958, except for a brief mention of the abortive 1960 Geneva Conference. The editor states in a footnote that the pearl-fishing dispute between Australia and Japan 'is now unlikely to be litigated'[2] before the International Court, although the text states that agreement has been reached on the terms upon which the dispute would be presented to the Court. No mention is made of significant international developments in the application of the four Conventions; and for the 'behind the scenes' wranglings between individual States of the Commonwealth amongst themselves and with the Commonwealth, over whether they were bound to observe the terms of the Convention on the Continental Shelf in the apportionment of access to Australian off-shore mineral and other resources, and whether they or the Commonwealth have rights over the Continental Shelf, reference has to be made to the following chapter by the editor himself.

The first three chapters illustrate another difficulty—that of avoiding overlap. When three topics as closely related as 'The Evolution of Australia's International Personality', 'Australian Constitutional Law in Relation to International Relations

[1] *Problems of Australian Coastal Jurisdiction* (1958), vol. 34, p. 199. In fact, parts of this article appear word for word in the chapter in *International Law in Australia*.

[2] p. 235.

and International Law' and 'Australian Treaty Making Practice and Procedure' are tackled by three writers (D. P. O'Connell, G. Sawer and A. H. Body respectively) the dangers are inescapable. Repetition is avoided, but at the cost of a certain lack of coherence. Hence A. H. Body's lament in his conclusion to Chapter III: 'There are other matters relating to treaty-making which might perhaps have been discussed in the present chapter, but they have been analysed elsewhere in this volume.'[1]

Two other issues to daunt the most optimistic editor are the question of what audience to aim at, and the cognate problem of ensuring that all contributions aim at the same level of understanding on the part of the reader. In a short foreword, the Commonwealth Chief Justice welcomes the book in the light of the need for a wide base of well-informed and thoughtful citizens in the electorate. 'Democracy has taken root in Australia to the point that popular views must always be taken into account by Government, and, subject to the ever present need for leadership, policies must be attuned to the current opinion in the electorate.'[2] With respect to Sir Garfield Barwick, the present reviewer cannot imagine that this volume either has had, or is likely to have, any impact whatsoever upon the electorate. In the group of chapters dealing with Australia's membership of a variety of international institutions and treaty organizations, only Chapter IV, 'Australia's Commitments under the United Nations Charter', by R. L. Harry, at the time Australian Ambassador to Belgium, and perhaps the few pages on the South Pacific Commission by J. Varsanyi (Chapter VIII), are sufficiently general for the 'reasonably intelligent layman', but the rest are clearly directed at a more specialized audience. Even though Chapter VII on air law and I.C.A.O. by T. A. Pyman of the Commonwealth Department of Civil Aviation, and Chapter IX on the financial institutions and the Colombo Plan by P. H. Bailey, are well written (particularly the former), and valuable explanations of the Australian viewpoint, they are hardly likely to appeal to the layman.

If one disregards the foreword, and takes the standard of the majority of the essays, then one must conclude that the book is intended to aim at a better-informed reader, who, nevertheless, is seeking both instruction in general and information from an Australian standpoint in particular. In fact, since the book is produced under the auspices of the Australian Institute of International Affairs, it is presumably designed for those, particularly in Australia, who have a special interest in international relations and international law. The reviewer does not feel competent to estimate how far the contributions will prove acceptable to this rather limited circle. However, there is a larger group of persons who would benefit from a closer study of *International Law in Australia*, namely Australian undergraduates or graduates taking a general course in international law. This volume will hardly meet all their needs: it is in no sense a textbook, and leaves uncovered much of the field normally dealt with in a textbook. If it is used in conjunction with a textbook (apart from the inevitable difficulty of finding such a textbook), parts of the book will lose their value. Turning again to the chapter on the United Nations Charter, one cannot escape the conclusion that, despite its references to the comments of a number of Australian politicians, and to Australia's written statement to the Court in the *Expenses* case, it would come as a disappointment to anyone looking for a succinct account of the Australian contribution to the United Nations practice. Nor would it add much that was useful to what most textbooks would say about *any* State's commitments under the Charter.

Two chapters are now partly obsolete, although in neither case does any blame rest with the author. Chapter XVII on diplomatic and consular immunities and privileges

[1] p. 64. [2] p. vi.

by J. Leyser has been affected by the passing of the Commonwealth Diplomatic Privileges and Immunities Act of 1967, which gives effect to the 1961 Vienna Convention. Similarly, Chapter XXI by I. A. Shearer, in so far as it deals with extradition, has to be read in conjunction with two Commonwealth statutes of 1966, the Extradition (Foreign States) Act, and the Extradition (Commonwealth Countries) Act. The latter chapter is unfortunate also for a second reason, again not the author's fault, namely for the degree to which English authorities have to be cited and dealt with as illustrations of Australian law. This criticism may be said to reflect a personal preference; but might it not have been more in keeping with a book concentrating on the Australian contribution to, and attitudes towards, international law, if those matters dealing with the application of the common law in which reliance has to be placed primarily on English authorities had been dealt with together in a single chapter? The adoption of international law into municipal law is only cursorily mentioned in Chapter I, but it is a topic which could have incorporated a number of questions relating to the application of common law doctrines. Finally, in connection with Chapter XXI, while accepting that it is possible to argue that States 'sharing common ideals and facing common foes' should provide formally 'for the extradition of persons engaged in espionage and subversive activities which affect the common interests of those states' (thus avoiding the type of situation that arose in the *Soblen* incident), the present reviewer feels obliged to challenge the second reason given by the author in support of his contention. Mr. Shearer writes that not only would his solution have the merit of being straightforward, it would also have the merit, 'by increasing the likelihood of apprehension abroad, of deterring greatly the commission of espionage and like offences'.[1] It is hardly to be supposed that a foreign agent operating in the United States will be deterred from carrying out his activities by the extradition laws of Australia or the United Kingdom.

Perhaps the most informative chapters from the standpoint of the international lawyer are those contributed by A. C. Castles on Australia's Overseas Territories and the status of its Antarctic Territory. If for no other reason, they should be read for their comprehensive account of the factual basis of Australian territorial and jurisdictional claims. The same writer achieves similar success with the narrative sections of his third contribution, 'The United Nations and Australia's Overseas Territories'; but in the section which deals with the law-making force of United Nations resolutions (quite apart from the fact that he is stating a contrary view to that expressed by R. L. Harry in Chapter IV), the author seems rather hasty in equating possible political effects of political action with 'law-making'. 'Difficulty may be thought to arise . . . when provisions of the Charter, which seem reasonably precise and therefore susceptible to conventional legal analysis, have been made the subject of resolutions which seem to violate the plain meaning of the rights and obligations imposed by the Charter. But even in such instances it is hard to deny the law-making quality of these resolutions when it is remembered that U.N. organs have a power of interpreting Charter provisions . . . .'[2] If all member States acquiesce in disregarding a provision of the constitution of an international organization, it may be possible to give legal effect to such a practice; but the contention is totally insupportable that the General Assembly can by a majority vote override the express wording of the Charter and create 'law' binding on a dissenting minority. Indeed, it may be that in strictly legal terms the doctrine of estoppel could not be applied in such a case to prevent members

[1] p. 566.

[2] p. 371. A. C. Castles has recently elaborated on this view in an article that is equally unconvincing; see *Adelaide Law Review*, 3 (1967), p. 68.

that had voted with the majority from subsequently adopting a contrary interpretation.

International Law in Australia is a worthwhile venture. The publishers and the Australian Institute of International Affairs are to be congratulated for their support, and the editor for having undertaken an unenviable task. The volume does not maintain the same high standard throughout, but some unevenness is perhaps inevitable in any book of this type. Individual readers may question why a particular subject was emphasized and another largely ignored. The present reviewer, for example, was somewhat surprised to find that, except for a brief reference to the pleadings in the *Expenses* case, no mention was made of Australian participation, either at government or personal level, in the work of the International Court. It was unfortunate that in two chapters contrary views should have been expressed of the legal effects of resolutions of the United Nations General Assembly. For a number of reasons, therefore, this collection of articles cannot be considered an unqualified success. Nevertheless, taken individually, many of the contributions are valuable expositions of the Australian attitude towards various aspects of international law. Between them, they emphasize the growing strength of the Australian Law Schools in the field, and set a commendable standard for the nascent *Australian Year Book of International Law*.

D. W. Greig

The Foundations of Freedom: The Interrelationship between Democracy and Human Rights. By Durward V. Sandifer and L. Ronald Scheman. Foreword by José A. Mora, Secretary-General of the Organization of American States. New York: Frederick A. Praeger, Inc.; London: The Pall Mall Press Ltd. 1966. xiii+139 pp. $5 (or £1. 18*s*. 6*d* in U.K.)

The title of this volume is somewhat imposing. Its authors' stated purpose is no less intimidating. It is, in their own words, 'to state a relationship between two ideas: human rights and representative democracy' (p. 3). The breadth of the undertaking and the small size of the end product will inevitably recall J. S. Mill's *On Liberty*. However, the resemblance between the two works ends there, for this short volume is a by-product of the work of an organ of an international institution. Professor Sandifer and Mr. Scheman are, respectively, a member of the Inter-American Commission on Human Rights of the Organization of American States (O.A.S.) and a member of the Department of Legal Affairs of the Pan American Union, the general secretariat of the O.A.S. Their book is a direct outgrowth of the Commission's formal programme of work, which consists of a series of special study projects under the direction of one or another member of the Commission.

Political theorists and historians may find some fault in the authors' broad-brush technique, and in the paucity of original ideas. They may also be disappointed in the summary treatment accorded to the significant ideological challenge of Dr. Castro's Marxism-Leninism to representative democracy as traditionally understood in Hispanic America. However, students of the development of international organization will doubtless find it less wanting. They will recall the institutional framework in which the authors have toiled, and they will quite rightly assume that the authors' true purpose was more modest than the title of their volume might otherwise have led one to believe.

Despite its title and stated purpose, this book is not a treatise on the concept and purposes of democratic government. Nor is it in any sense a reformulation of the democratic *credo*. Rather, it is an effort to restate the basic principles to which most Western nations have formally subscribed for the last two centuries. Bearing in mind the significance accorded by the authors to pronouncements on human rights by various organs of the Organization of American States, and the authors' own positions within that regional institution, one is inclined to regard this small book as a kind of 'primer' for the members of the O.A.S. and, perhaps as a statement of the tenets that necessarily serve as broad guidelines for the Inter-American Commission on Human Rights.

The establishment of the Commission in 1959, 'to promote respect for human rights' and to 'develop an awareness of human rights among the peoples of America', was, of course, a highly significant step toward the effective international protection of human rights in the States of the Western Hemisphere. Despite its ambiguous mandate—or perhaps because of it—the Commission has since its establishment undertaken a vigorous and broad-ranging, but wholly improvised, programme to promote respect for human rights among the members of the O.A.S. It has investigated, and sharply castigated, several dictatorial regimes with some limited success. During the Dominican intervention of 1965–6, it played an important role as an agency for humanitarian mediation. In the absence of a formal juridical definition of the Commission's jurisdiction and powers, or of the principles which guide its activities, a restatement of this sort, by two persons intimately acquainted with the Commission's work, is an important and valuable contribution to the literature on the efforts of this regional institution to promote respect for fundamental freedoms.

José A. Cabranes

Manual of Public International Law. Edited by Max Sørensen. London, Melbourne, Toronto: Macmillan & Co. Ltd.; New York: St. Martin's Press, 1968. lxv+930 pp. (including Index). £8. 8*s*. hard cover; 18*s*. paperback edition for sale in underdeveloped countries.

This important enterprise was commissioned by the Carnegie Endowment for International Peace and the assumption, as stated by its President in his preface, was that the Endowment 'could render a distinct and valuable service by the preparation and publication of a textbook that would reflect objectively, from an international rather than a national point of view, the status and role of international law in the complex world of today; built into this conclusion was the belief that such a text should be available, at a reasonable price, to teachers, students, government officials, practitioners and libraries, most particularly in the newly independent and developing countries'. Twelve authors have contributed to a very substantial manual which is comprehensive in terms of subject-matter, clear and precise in terms of presentation, and distinguished in terms of the general quality of execution. The contributors include two members of the International Law Commission, Mr. El-Erian of the United Arab Rebublic and Professor Jiménez de Aréchaga of Uruguay. Africa South of the Sahara is represented in the person of Mr. Mugerwa, the Solicitor-General of Uganda and Asia by Professors Murty of India and Oda of Japan. Eastern Europe is represented by Dr. Skubiszewski of Poland and Dr. Sahović of Yugoslavia. The

Western European contributors are the distinguished editor, Dr. Parry and Professor Virally, and the American contingent consists of Professors Deák and Bishop. In the preface it is said that these co-authors 'represent the major legal systems, traditions, and techniques of the modern world'. This profession is not to be accepted without reserve and, in any case, might lead the reader to expect a salad, as it were, of types of international law. In fact the volume has remarkable coherence of content and technique and this is to be explained by the circumstance that the contributors adopt the same technical approach and, in particular, have a common policy in using the sources of the law. The materials which predominate are those on which most orthodox (as opposed to the 'sociological') treatments of the law in the Western literature are built, but there is evidence in the text of a desire to avoid the rigidity and complacency of the traditional literature in English. The result may not reach an unquestionable standard of objectivity but, which is the significant feature, is unusually objective none the less.

The text is not supplied with footnotes but a varying, usually adequate, number of references are incorporated in the text itself. Each chapter has its own selected bibliography with references primarily but by no means exclusively to items in English and French. The date of final preparation of most of the material appears to have been 1965 but at least one chapter uses material up to the end of 1966, and in general the bibliographies include items which appeared in that year. A useful feature is the reasonably thorough index.

The volume commences with a chapter by Dr. Parry entitled 'The Function of Law in the International Community'. In the early part the inherent limitations on the role of all law are considered and a brief account is provided of the origin of the State and the society of States. There is a short section on the historical origins of international law which contains some interesting suppositions and relates law and politics sensibly. Dr. Parry is successful in indicating exactly how rules emerge, for example, out of the practice of the auto-limitation of domestic jurisdictions. Other topics considered include the role of war and the expansion of the system of international law. In the latter connection Dr. Parry fails to examine the effects of European imperialism of the period 1870 to 1914 on the development of the law.

It is helpful to have as an early chapter the sketch of 'The Legal Organization of International Society' by Mr. El Erian, introduced in terms of the historical experience. The account of the general legal problems of international institutions is, inevitably perhaps, disappointingly brief and the deeper problems of the status of regional organizations are not pursued. However, there is a good short account of the United Nations. Incidentally, in an otherwise very helpful bibliography appended to this chapter, there is no reference to the book by Mr. Jiménez de Aréchaga, *Derecho constitucional de las Naciones Unidas* (1958). In the third chapter Professor Virally provides a comprehensive survey of the sources of international law. It is notoriously difficult to give an account of the sources without touching on fundamental problems and Professor Virally refers to some of the wider issues. Nevertheless, he does not give sufficient prominence to the distinction, or the question of the distinction, between the existence of rules of law and the particular content of obligation between States. The treatment of custom omits the practical problem of change and 'subsequent objectors'. A curious feature of this and several other chapters in the book is the appearance of references to the concept of *jus cogens* without a cross-reference to a parent section in which this key concept is explained. There is in fact no such explanation in the book and *jus cogens* does not appear in the index. Professor Virally provides

a separate section on 'unilateral acts' and this is rather confusing since their relevance in the chapter would seem to be confined to custom. The chapter is completed by a somewhat misplaced section on the relation of international and municipal law which is reasonably informative but ignores the functional aspects of their integration.

Chapter 4 is on 'The Law of Treaties' and Dr. Parry, its author, has provided possibly the best middle-weight account of the subject in the recent literature. The problems are considered systematically and carefully with the exception of the issue of interpretation the treatment of which is too brief. Some interesting points are made about the treaty-making powers of institutions and revision by subsequent treaty. The sections on validity and termination contain no discussion of *jus cogens*, although in general Dr. Parry stays fairly close to the materials of the International Law Commission. As the reviewer has pointed out above, *jus cogens* remains something of an orphan in this volume. There follows an account of 'Subjects of International Law' by Mr. Mugerwa. The treatment is comprehensive in scope and empirical in tone. There are interesting sections on the operation of ships by international institutions and diminutive States. The latter contains the controversial view that these States do not possess the full capacity to enter into foreign relations and for this reason 'cannot be regarded as fully sovereign independent states' (p. 262). There is a very helpful examination of the problems of recognition in this chapter, which fails, however, to give emphasis to the significance of the *forum* in which the issues may be raised: the way in which the issue is solved may vary considerably as between United Nations organs, international tribunals and national courts. Moreover, like many other writers on the subject, Mr. Mugerwa assumes that the terminology of *de facto* recognition represents a consistent usage of governments: surely its content must depend on the context of the particular pronouncement. The chapter concludes with a section on succession of subjects which contains an interesting critique of devolution agreements.

Dr. Sahović and Professor Bishop contribute a composite chapter entitled 'The Authority of the State: Its Range with Respect to persons and Places'. The first sections concern State territory and in these an account of acquisition and loss appears. The space devoted to the subject would seem to be seriously inadequate and it does not help matters to include a rather general reference to the right of self-determination (p. 324) without a precise explanation of the ramifications. The law relating to the territorial sea, contiguous zone, and continental shelf is expounded realistically, although the section on the contiguous zone gives insufficient indication of the prominence of fishery zones and no commentary is provided on the definition of the shelf in Article 1 of the Continental Shelf Convention. Territorial air space, the high seas and outer space are considered and the chapter closes with a useful survey of extra-territorial jurisdiction. The survey is marred by a failure to refer to the principle of substantial connection.

Chapter 7 consists of a substantial study by Professor Déak on the immunities and privileges of State organs and of the State. It might be thought that, as a matter of balance, some other subjects get less than their due in the light of the attention given to immunities: but this is not a criticism of the thorough study presented by Professor Déak. The question of commercial activities by States receives close attention and there is a very useful account of waiver and counterclaims. In the context of the present volume parts of his study may be thought to rely overmuch on Anglo-American doctrine and decisions. Professor Oda contributes a chapter on 'The Individual in International Law' which divides as follows: nationality, the legal status of aliens, international protection of human rights, responsibility of the individual under

international law, and extradition. With reference to the topic of nationality it may be pointed out that the treatment is brief and, further, that in general the volume is weak on the important question of rules of attribution. The ramifications of the *Nottebohm* case are not examined here. The efficient section on the status of aliens includes an examination of expropriation. His conclusion is as follows (p. 488): 'These state practices lend support to the view that the requirement of adequate, effective and prompt compensation is not maintainable in cases in which alien property is acquired by the state to further general programmes of economic and social reform. However, this distinction may not be as clear-cut as it is generally considered. . . . It may well be that each case must be handled in the light of its particular circumstances, the value of the property taken, the financial resources of the expropriating government, and perhaps other political considerations as well.' There is a good account of developments affecting human rights but the author was apparently unable to take account of the *South West Africa* Cases (Second Phase) and the references there to the principle of equality. The treatment of criminal responsibility of individuals in the penultimate section of this chapter suffers from a lack of perspective because insufficient information is given on the legal background relating to 'orthodox' war crimes and thus the Nuremberg Charter is made to seem more radical than it really was.

Professor Jiménez de Aréchaga is the author of the excellent chapter on international responsibility. A great deal of law is presented with precision and clarity and there are many useful references. Restitution, the continuous nationality rule, the local remedies rule and the Calvo clause, among other matters receive careful analysis. The only criticism which occurs to the reviewer is that more attention should have been given to the actual provisions of claims settlements concerning classes of claimant. The chapter includes a section on responsibility and the making of claims with reference to international institutions. Chapter 10 consists of Professor Sørensen's study of 'Institutionalized International Co-operation in Economic, Social and Cultural Fields'. A considerable amount of information is presented in a nicely structured survey of the great variety of modern institutions. Equally informative and comprehensive is the following chapter by Professor Murty on settlement of disputes, which includes a good short account of the International Court, and a section on dispute settlement in the specialized agencies.

The final chapter in the *Manual* deals with the use of force by States, collective security and the law of war and neutrality. Its author Dr. Skubiszewski has produced what is almost certainly the best available account of the subjects concerned in a little over a hundred pages. The exposition is clear, careful and objective. Modern problems are examined and placed in a proper legal context and thus the civil strife situation is given some prominence (pp. 748–50, 757–60). His conclusion on the matter is 'that the role of law in regulating the conduct of states in questions of subversive interventions and counter-interventions is not unequivocal and the general prohibition of Article 2 (4), together with the law of intervention, lay down standards of behaviour for states that are neither specific nor wholly clear'. In a number of contexts (pp. 748, 777), Dr. Skubiszewski refers to the sending of irregular forces across a frontier or the permitting of frontier crossing by such forces. This situation raises problems of agency or command structure, especially in relation to the concept of armed attack, and the text is less than precise on the relation of 'armed attack' and 'use of force' (see p. 748). The presentation of the *Corfu Channel* case (Merits) leaves the reader unclear about its relevance for the law as a whole. The issues of self-defence and collective self-defence are analysed with skill and there is an interesting discussion

of the permitted use of force other than in self-defence. Incidentally, in relation to the definition of aggression the writer refers to the Conventions concluded by the U.S.S.R. in 1933 without referring also to other conventions on the same subject concluded by a good number of other States in the same period. British diplomacy also favoured treaty definitions: see the appendices to M. V. Seton-Williams, *Britain and the Arab States* (London, 1948). After the use of force by States, Dr. Skubiszewski gives an excellent short account of the use of force by international institutions which includes a most useful survey of peace-keeping measures. The last section of the chapter deals authoritatively with the law of war and neutrality and maintains a balanced view about the impact of the new technology. Of special interest are the passages on the unlawful belligerent and operations of international forces. It is perhaps unfortunate that the treatment of neutrality is very brief and is unrelated to the problem of collective security. The volume concludes with a general bibliography which contains a useful survey of United Nations documents. The *Manual* is clearly a success and would be a valuable addition to any library. As a book for students, it is certainly suitable for the better grade of student: the sophistication of much of its content is a quality for some but it may constitute too rich a meal for others.

IAN BROWNLIE

The River Basin in History and Law. By LUDWIK A. TECLAFF. The Hague: Martinus Nijhoff, 1967. 228 pp. Guilders 29.50.

Ranging in time over the whole era of human civilization and world-wide in its geographical scope, this interesting study sets out to examine the extent of the determining effect of the physical unity of the river basin on the law, politics and economy of its inhabitants and their societies.

In the penultimate chapter, which constitutes more than a third of the work's length, the author gives an account of the growth in modern times of the movement towards the comprehensive development of the resources of the river basin. The establishment and institutional structure of the Tennessee Valley Authority and analogous institutions in countries outside the United States are described, as are arrangements governing schemes for the development of international basins such as that of the Columbia River, shared by the United States and Canada. Together with the discussion in earlier chapters of the importance of the river basin in ancient, medieval and modern cultures, the account of the contemporary approach to comprehensive planning is regarded as significant in so far as it is capable of providing possible confirmation of the deterministic hypothesis under investigation. Thus the historical matter is recounted with the object of testing the deduction from the theory of the determining effect of the physical unity of the river basin, that in so far as that unity 'constitutes some kind of permanently valid imperative for the human occupants of the river basin', it must 'even before it was formally conceptualized . . . have found some form of legal expression'.

Notwithstanding its title, the book does not contain the analysis in detail of legal rules and concepts which one might expect to find in a treatise on the law of the river basin. There are, indeed, many references to the problems of international and municipal legal doctrines such as those which relate, for example, to the reconciliation of the conflicting interests of different riparian owners, but these references seem

relatively incidental. It follows that the main usefulness of the work for the international or comparative lawyer is likely to lie in its virtue as a guide to the sources and instances which must be considered in attempting a definitive legal analysis. It is, of course, valuable as background material; but since more thorough discussion of some of the issues of general international law arising out of the exploitation of international river basins is sometimes to be found in general textbooks, Professor Teclaff's book could hardly qualify, and is clearly not designed to serve, as a standard legal monograph.

The narrow question of the usefulness of the work for legal scholarship apart, the author's success in his declared aims could hardly be assessed adequately except by one who combined the roles of geographer and political and economic historian. The author seems to conclude from his evidence that the river basin's physical unity does have a determining effect in tending to produce a legal and institutional unity in the use and control of its water resources; but he regards the wider function of river-basin authorities which have been entrusted with responsibility for the comprehensive development of the basin's economic resources as exceptional, rather than as a necessary or a universally desirable consequence of the physical unity of the basin. To the reader unversed in the whole range of disciplines on whose learning the author has drawn, these prudently modest conclusions appear to be convincing as inferences from the impressive wealth of supporting historical fact on which the author has relied.

A. R. Carnegie

La Corte di Giustizia della Communità Europea. Volume 1. By Antonio Tizzano. *Pubblicazioni della Facoltà Giuridica dell'Università di Napoli,* LXXVIII. Naples: Casa Editrice Dott. Eugenio Jovene, 1967. xxiii+480 pp. L. 5500.

This is the first volume of what promises to be a comprehensive study of the Court of Justice of the European Communities. The author considers that an understanding of the functioning of the Court is essential to the full comprehension of the phenomenon of the European Communities, and his aim, therefore, is to contribute to the discussion on the Communities an exhaustive and pragmatic study of the Court.

In the Introduction the author deals with general matters relating to the Court. He places the Court within the wider framework of international arbitral and judicial tribunals; he points the contrast between the European Court and traditional international tribunals, manifested in the Court's permanence, the scope of its jurisdiction and the frequency of recourse to it. He emphasizes the originality of the conception of the Court as the first judicial organ established within an international organization with compulsory jurisdiction over all matters relating to the activity of the organization. The most characteristic applications of the judicial function in such a context are control over the spheres of competence of the different organs, and over the constitutionality of their acts. In other international organizations, where the organs are, typically, political in composition and their acts are not usually binding on members, there is little scope for a centralized judicial organ, and the judicial function may be appropriately shared out among the political organs representative of member States. A centralized judicial organ is, however, essential to the functioning of an organization such as the European Communities, which comprises both political and technical organs having relations with similar bodies within member States and with individuals.

A second striking feature of the European Court is the law which it applies. The Community Treaties do not designate by any general rule the law that the Court is to apply, nor, in general, indicate any limits to the Court's discretion. This is not unprecedented in the history of international adjudication: *ad hoc* tribunals have frequently been directed simply to decide 'impartially', and have succeeded in finding principles to guide them in that task. But the task of the European Court is, clearly, much more complex: for it must operate permanently within a highly sophisticated political, administrative and technical institutional structure, and supply the detailed legal framework for that structure. Although the three constituent instruments of the Communities are the essential points of reference for the Court's task of creating Community law, they do not provide a complete legal order. They consequently leave a wide measure of discretion to the Court both to interpret—for example, to give meaning within the Community structure to such municipal law concepts as *détournement de pouvoir*, *faute de service*, etc.—and to fill in gaps in Community law. In performing both these tasks the Court has a rich mine of rules in the laws and jurisprudence of member States; but, like other international tribunals, the Court is usually content simply to refer to 'general principles' without more precisely indicating their provenance or entering into comparative studies of the law of member States, or even specifying the degree of uniformity of the principles referred to. In interpreting the Community Treaties, the Court generally refers to the traditionally paramount importance of the intention of the parties, as expressed in the words of the Treaties and their related documents; but it exercises its considerable discretion to further the broad aim of welding the Communities into a harmonious whole. The author points out that this does not mean that the Court adopts a functional approach to the interpretation of the treaties in order to extend the powers of community organs at the expense of member States; granted the ample powers given to community organs by the Treaties, a more restrictive approach may often seem more expedient.

The rest of this work is divided into four parts. The first deals with the organization of the Court; the second, with the ambit of its contentious jurisdiction; the third, with other aspects of the Court's activities, including its advisory jurisdiction. This first volume contains Part 1, but the bulk of it is taken up with Part 2. The author deals with the jurisdiction of the Court under each of the Treaties together. He discusses first the jurisdiction of the Court *ratione personae*—that is, over the Communities and their organs, member States, individual subjects of the internal law of member States and community employees—and, secondly, *ratione materiae*—that is, over the activities of member States and of community institutions and over disputes between the Community and its employees relating to matters connected with their employment. The volume has a full table of contents but no index.

A. L. W. Munkman

International Law: Indian Courts and Legislature. By S. K. Agrawala, with foreword by Professor Louis B. Sohn. Bombay: N.M. Tripathi Private Ltd., 1965. x+289+Appendix and Index. Rs. 30.

This work, which orginated as a doctoral dissertation, is concerned primarily with an analysis of Indian legislation and judicial decisions upon three topics: State succession, nationality and extradition. This main part of the work is preceded by an intro-

duction, which might be described, to coin Professor Falk's phrase, as an analysis of the role of domestic courts in the international legal order. The final part constitutes a further consideration of the relationship between international and municipal law.

As Professor Sohn in his foreword to the book observes, 'for a long time, there has been a dearth of books and articles on domestic application of international law, and only scant attention has been paid to the practice of national courts and legislatures in the field of international law'. Fortunately, in recent years, increasing attention has been paid to this aspect of international law, with the appearance of national digests of State practice, the *International Law Reports* and *British International Law Cases*. Dr. Agrawala has now, for the first time, made readily available to all the practice of an Eastern State in three important areas of the law. His is a pioneering endeavour and is one which, one ventures to observe, fulfils many of the aims of the drafters of the Pamphlet 'Ways and Means of making the Evidence of Customary International Law more readily available' (U.N. Document A/CN, 4/6 (1949)).

Dr. Agrawala certainly makes the practice of two organs (the legislative and judicial) of one State more readily available. To state that this is not enough is no criticism of Dr. Agrawala—but it is submitted that it is indeed not enough. To the municipal lawyer, statutes and cases look like law—but one is well aware that, in general, 'the State speaks with one voice in international law' and that that voice is usually the voice of the executive. Interesting and informative, therefore, as municipal statutes and cases are for the international lawyer, of even greater utility and interest to him is the record of the practice of States in their executive capacity. One can but hope that the success of Dr. Agrawala's book will encourage the production, in due course, of a full Digest of Indian State practice.

This the present book does not—and for obvious reasons cannot—attempt to be. It does, however, present to the reviewer and, he suspects, to the majority of English lawyers, a mass of material much of which has previously been unfamiliar to him. The three topics with which the work is primarily concerned are well chosen and, as the author states, they are subjects in respect of which 'the case law in the judicial reports of any country is bound to be abundant, since these are fields of international law which will for a considerable time to come remain within the province of national courts' (p. 10).

In the opinion of the reviewer the least satisfactory parts of the work are those which are concerned with general issues. When analysing statutes and decisions Dr. Agrawala displays a splendid professionalism and an impressive grasp of the materials. But when dealing with the general role of international law, Dr. Agrawala writes (at p. 4) of 'the emergence of a world federation of our dreams'. Who 'we' may be is not specified; the reviewer can only record his own view that such federation is impossible of achievement and also that its pursuit by writers is likely to lead to an optimistic misunderstanding of international relations in general. It is this sort of cheerful optimism expressed in the first and last parts of the work which cause these parts to depart from the generally high standard set by the author. It is suggested that the view which propounds the establishment of 'the majesty of international law over national sovereignties' (p. 267) ignores the very process by which international law is created. In the reviewer's opinion, Dr. Agrawala in these parts of his work tends to exaggerate the true importance of municipal courts in the development of international law and he suggests that a national court will—and generally must—primarily apply in national law and will then, secondarily, incorporate into national law rules of international law if there exist no competing rules of municipal law. It either event,

the national court will add to the general corpus of 'the practice of States' which goes to build up international law.

In the main part of the work Dr. Agrawala proceeds with surer step. In dealing with State succession, he considers first the legal rights and interests of private persons, with especial reference to the so-called doctrine of acquired rights and of 'act of State' and then proceeds to consider contractual rights and claims in tort. He next deals with the effect of succession upon public rights and duties and concludes this section with a section on the position of the civil service. In the section on nationality Dr. Agrawala considers, first, general questions of domicile and nationality and, in especial, the *Nottebohm* case. He analyses the Indian law of nationality, and his treatment of the relationship between domicile and nationality and of passports is of particular interest. He then deals with the provisions and effects of the Indian Citizenship Act of 1955. He might, in general, in this section, have relied with profit rather more heavily upon the writings of Dr. Parry, especially when considering the history of citizenship law in India. In the section upon extradition Dr. Agrawala first considers the nature of extradition and with aspects of the distinction between extradition and deportation, and afterwards the requirements of extradition and the procedures for extradition from India to foreign States, and with rendition within the Commonwealth.

The conclusions reached in this part of the work are not controversial and these sections are valuable primarily for their straightforward presentation of the principal Indian judicial decisions, which presentation is well supplemented by an invaluable appendix of almost one hundred pages in which the legislation, orders and regulations relevant to these three topics are reproduced *in extenso*. One may, perhaps, regret that at some points Dr. Agrawala has dwelt rather too much upon general international law (e.g., pp. 101–10, upon nationality and international law) and has not devoted greater space to specifically Indian developments and to longer extracts from Indian cases.

In conclusion, the book achieves what it sets out to do and is an informative and well-balanced study of three aspects of the law in Indian legislative and judicial practice. It is a pity that it is not better bound and printed and that the proof-reading is of a very low standard. Printing errors may be found upon virtually every page and it would be tedious to catalogue them. Even so, one is bound to mention that at pp. 108–110 there are ten references to each of the parties to the *Nottebohm* case which are consistently referred to as, respectively, 'Leichtenstein' and 'Gautemala' and in one case even 'Gauntemala'. Dr. Agrawala deserved better than this.

JOHN HOPKINS

A Manual of International Law. 5th edition. By GEORG SCHWARZENBERGER. London: Stevens & Sons Ltd., 1967. lix+701 pp. (including index). £4. 17*s*. 6*d*.

A mere twenty years have elapsed between the publications of the first and fifth editions of Professor Schwarzenberger's well-known Manual. This in itself speaks for the success of the work and for its great utility to students of international law of all ages.

The present edition of the Manual 'maintains its continuity with the earlier editions' (p. vii). The pattern of the work is well known; it is divided into three parts—Elements of International Law, Study Outlines and Further References, to the first of which

parts a good deal of revision has been carried out in the present edition. Unlike its immediate predecessor, this edition is published in one volume rather than in two. The metamorphosis has been effected 'to keep the price of the Manual within reasonable bounds in an inflationary era' and has led to a slight decrease in the total number of pages and to the excision of the texts of the Charter of the United Nations and of the Statute of the International Court of Justice. This excision Professor Schwarzenberger regrets. The present reviewer does not share this regret; he is, in fact, delighted to find a textbook of this size for once unburdened with these ubiquitous documents and he is of opinion that the student who comes fresh to international law will be relieved to be able to buy Professor Schwarzenberger's Manual in its new, handy format which he may then supplement with a convenient, pocket-sized edition of Charter and Statute.

The expository part of the Manual runs to approximately 400 pages of which slightly under half are concerned with the nature of international law and with the law of peace; these are followed by some 50 pages on the law of war and neutrality. Then come about 150 pages on international institutions and this part of the work ends with a chapter entitled 'Patterns of International Law and Organization in the Nuclear Age'. Professor Schwarzenberger has triumphed over the limitations imposed by a self-denying ordinance in that he has succeeded, within so few pages, in giving a coherent account of modern international law and of its history.

Whilst Professor Schwarzenberger is to be congratulated warmly upon this achievement, in the opinion of the present reviewer, the first part of the Manual has, by reason of its very brevity, certain disadvantages which will be encountered by the student fresh to international law for whom, presumably, this part is primarily intended. In the first place, this part of the work contains a number of statements and assertions which, whilst doubtless correct, tend to be a trifle disconcerting by virtue of their lack of discussion and the absence of authority cited in their support. Thus, for example, one is informed at p. 28 that 'new States or outsiders were co-opted as members of the legal system [the international legal system] by way of recognition'. Indeed, upon occasion, certain statements are positively inscrutable: 'International Law is universal law. Thus, the state of relations between Powers in different blocs or between such Powers and non-committed States is probably a more commensurate test of the accuracy of the prognosis of a growing interpenetration between international law and municipal law' (p. 52).

Secondly, Professor Schwarzenberger is at pains to point out to the beginner that international law is susceptible of a variety of different approaches. This is admirable —but, again, one wonders whether the beginner will not be in some danger of disappearing beneath the surface of an ocean of long words and strange concepts. The eleven lines upon the sociology of international law at p. 24 are a fair example. Professor Schwarzenberger's own devotion to the inductive method is well known. It is a method of which the present reviewer, if he understands it correctly, approves strongly. One wonders, however, whether 'seven principles' which Professor Schwarzenberger regards as fundamental to international law (sovereignty, recognition, consent, good faith, freedom of the seas, responsibility, self-defence) themselves derive from the employment of the inductive method. Further, it is, perhaps, a little disappointing that though one is informed (at p. 24) that the 'generalizations found in [the] Manual are based primarily on the practice of international courts and tribunals, supplemented where indicated by reference to Anglo-American state practice', the references to such practice in this part of the Manual are somewhat sparse. Thus, for

example, when dealing with the question of the recognition of States and governments, Professor Schwarzenberger makes no mention of the marked divergence of the practices of the British and United States Governments.

Thirdly, it may well be that there is a certain lack of citation of cases and incidents and indeed of references in this part of the book. Footnotes abound in some places: thus, for example, one finds at p. 65, thirteen footnotes, ten of which refer to later pages and three to earlier pages of the book. Yet when pursued, these several references are to nothing more than to somewhat bald statements of law themselves unsupported by cited authority, or to general discussions. Upon occasion, however, a specific reference is made to a case. For example, at p. 32, reference is made to the *Lotus* case. The footnote thereto refers one to p. 412 of the 'Study Outlines', where one is informed that the case is reported in '(1927—P.C.I.J.) A. 10' and also, by virtue of the fact that the case is marked with an asterisk (*) that an extract from it is to be found in Professor Green's *International Law through the Cases* (2nd edition, 1959).

So far, so good. But the unfortunate novice may well find that Professor Green's work has been taken from the library shelves and is in use elsewhere. Presumably, then, the novice is encouraged to read the whole of '(1927—P.C.I.J.) A. 10'—a somewhat daunting prospect, likely to lead to some confusion. And how much the greater will be his confusion when, upon p. 63, he finds himself, on the question of mandated territories in general and South West Africa in particular, referred somewhat cryptically to p. 312, where he is told: 'following the [International] Court's judgment in the *South West Africa* cases in 1966, the General Assembly adopted a resolution to terminate the mandate, place the territory under direct United Nations responsibility and establish an *ad hoc* committee to recommend how South West Africa should be administered'. This is followed by a footnote which directs him to p. 594, where he is instructed to read not only the three opinions of the International Court of Justice upon South West Africa which were delivered before 1957, extracts from which were included in Professor Green's work, but also those of 1962 and 1966 which were antedated by that work. Is he to read the whole of the two cases? If so, it is the suspicion of the present reviewer that he will seek refuge in some apparently less demanding branch of the law—not least because the reference at p. 594 also directs him to three articles and to two other parts of the Study Outlines. One ventures to hope that in future editions, Professor Schwarzenberger will provide rather more guidance in the text or some indication of essential materials in the Study Outlines.

Fourthly, Professor Schwarzenberger has employed a number of charts and diagrams to illustrate the text. To certain of these, the reviewer wishes to give unstinted welcome and praise. The diagrams at pp. 128, 129 and 140 seem to him to be wholly admirable illustrations of 'maritime frontiers' and of the continental shelf. On the other hand, he found himself totally bemused by, for example, the diagram at p. 11 which illustrates 'the three types of law' and by that at p. 43 which illustrates 'the rules and principles of international customary law' whilst he feels bound to confess that the diagram at p. 72 on the 'acquisition of international personality' served only to remind him of the almost nightmarish nature of the topic. He found Professor Schwarzenberger's article in *Current Legal Problems*, 20 (1966), p. 192, of utility in explaining the purpose of such diagrams—but he is still left with some doubt as to their true value. He must also record that he found himself reflecting upon the answer which might be given to the question posed upon p. 595.

The second part of the work is the 'Study Outlines', which are by way of being an exhaustive bibliography upon many subjects. These are most impressive. Professor

Schwarzenberger writes about them that 'even for the purposes of more advanced studies it is *not* necessary to read all the material recommended in [them] . . . merely to think over the *questions* should prove helpful'. One respectfully agrees. None the less, as has been indicated above, it is regrettable that no indication other than references to Professor Green's work has been given as to the relative importance of the references. One cannot but feel that even the advanced student may find himself bemused. Indeed, one wonders what the fruits of even a prolonged pondering of the question at p. 566 ('"A body of International Law is growing up with regard to aerial warfare . . . of which Sir Charles Hedges in 1966 could have no possible idea" . . . Discuss') would be.

For many parts of the Manual the reviewer has nothing but praise—and he singles out for especial praise the Chapters on 'State Jurisdiction' and the 'Law of International Institutions'. They present in a brief compass an impressively comprehensive and comprehensible survey of these branches of the law—as do the Chapters upon 'Objects of International Law' and 'International Transactions'. The work as a whole, and especially the 'Study Outlines', will be of as great utility to students of international law as were earlier editions. It is believed that it will be of great use both to the advanced student and to the beginner, though the latter would be well advised to turn first to the pages of, for example, the late Professor Brierly before addressing himself to Professor Schwarzenberger's more formidable pages.

JOHN HOPKINS

TABLE OF CASES [1]

Abdul Rahman al Baker *v.* Alford, 239
Adams *v.* National Bank of Greece, 163
Adelaide Electric Supply Co. Ltd. *v.* Prudential Assurance Co. Ltd., 243
Administration of Posts and Telegraphs of the Republic of Czechoslovakia *v.* Radio Corporation of America, 7
Administrative Tribunal of the I.L.O., 133
Administrative Tribunal of the U.N.: *see* Effect of Awards
Admission to Membership of the United Nations (Competence of G.A.), 99, 133, 218, 233
Aeronautics in Canada, *In re*, Regulation and Control of, 232, 259–60
Agrarian Reform in Roumania and . . . Hungarian Optants in Transylvania, 131
Alabama Case, 62
Algera Case, 313
Ali *v.* Ali, 300–1
Allen *v.* Thorn Electrical Industries, 130
Alsing Trading Co. *v.* Greece, 8
Amand, *In re*, 268–9
Amodu Tijani *v.* Secretary, Southern Nigeria, 252
Angelo *v.* Angelo, 302, 304–5
Anglo-Iranian Oil Company Case (United Kingdom *v.* Iran), 18, 20–4, 27–8, 34
Anglo-Iranian Oil Company *v.* Idemitsu Kosan Co., 269
Anglo-Iranian Oil Company *v.* SUPOR, 268
Anisminic Ltd. *v.* Foreign Compensation Commission, 137
Arantzazu Mendi Case, 131
Argentine Republic and the Republic of Chile, Arbitration . . . concerning . . . Boundary, 135
Armitage *v.* A.-G., 303
Asrar Ahmed *v.* Durgah Committee, 248
Assecurazioni Generale *v.* Cotran, 261
Asylum Case, 236
Attorney-General for British Columbia *v.* Attorney-General for Canada, 232, 235, 255
Attorney-General for British Honduras *v.* Bristow, 254
Attorney-General for Canada *v.* Attorney-General for Ontario, 231, 233, 257–9, 261
Attorney-General for Hong-Kong *v.* Kwok-a-Sing, 234, 242
Attorney-General *v.* Southern and Western Railway Co. of Ireland, 259
Auckland Corporation *v.* Alliance Assurance Co., 243
Austro-German Customs Union, 236

B (S) (An Infant), *In re*, **309–10**
Baccus S.R.L. *v.* Servicio Nacional, 17–18
Balfour Guthrie & Co. Ltd. *v.* United States, 150, 165
Banco Nacional de Cuba *v.* Sabbatino, 125
Bank of Augusta *v.* Earle, 159
Barcelona Traction, Light and Power Company Ltd. Case, 117–18
Baron *v.* Ayre N. O. and Others, 134
Barotseland, Western Boundary Arbitration, 135
Berthiaume *v.* Dastous, 234
Blabon *v.* United States, 139
Blonde, The, 261
Bolivia and Peru, Boundary Arbitration, 135
Bonacina, *In re*, 299
Bonython *v.* Commonwealth of Australia, 243–4
Boundary Arbitrations: *see* Argentine Republic and Chile; Barotseland; Bolivia and Peru; Brazil-British Guiana; Labrador; Nicaragua and Honduras
Brazil-British Guiana Boundary Arbitration, 135
British Coal Corporation *v.* R., 231, 233
Brown *v.* Brown, 302, 304–5
Buck *v.* A.-G., 129–30, 134, 136
Burmah Oil Co. Ltd. *v.* Lord Advocate, 140

Cabolent, N. V. *v.* N.I.O.C., 18
Cape Breton, *In re*, 236
Caroline, The, 200
Certain Expenses of the United Nations, 97–8, 110–11, 126, 134–5, 138–9, 166, 197, 208, 215
Chancellor, The, 234
Chandler *v.* D.P.P., 136
Cheni *v.* Cheni, 300–1
Chief Tshekedi Kama *v.* Ratshosa, 256
China Navigation Co. Ltd. *v.* A.-G., 139
Christian *v.* Corren, 229
Chung Chi Cheung *v.* R., 234, 245
Civil Air Transport Inc. *v.* Central Air Transport Corporation, 240
Civilian War Claims Association *v.* The King, 139
Clark *v.* Clark, **302**

[1] The figures in heavier type indicate the pages on which cases are reviewed.

Compagnie du Port, des Quais et des Entrepôts de Beyrouth *v.* The Société Radio-Orient, 27, 33–4
Constitution of the Maritime Safety Committee of the . . . Maritime . . . Organization, 141
Cook *v.* Sprigg, 234, 248
Corfu Channel Case, 134, 205, 215
Cox *v.* Army Council, 272
Cox *v.* Green, 125, 133
Cristina, The, 245
Croft *v.* Dumphy, 234, 255
Croydon Development Plans, *In re*, 134

Dalmia Dadri Cement Co. *v.* Income Tax Commissioner, 249
De Becker Case, 127–9, 143
De Bueger *v.* J. Ballantyne & Co., 243
De Jager *v.* Attorney-General for Natal, 263
Direct U.S. Cable Co. *v.* Anglo-American Telegraph Co., 255
Diverted Cargoes Case (United Kingdom *v.* Greece), 2
Dominion of Canada *v.* Province of Ontario, 257
Dudfield *v.* Ministry of Works, 136
Duff Development Co. *v.* Government of Kelantan, 17, 19
Dusseldorf, The, 255

Effect of Awards of Compensation made by the United Nations Administrative Tribunal, 91, 96, 105–6, 111–16, 121, 133, 139–41
El Conando Case, 245
Electricité de Beyrouth Company Case (France *v.* Lebanon), 27
Ellerman Lines *v.* Murray, 292
Elphinstone and Robertson *v.* Bedreechund, 247
Eshugbayi Eleko *v.* Administering Government Officer, Nigeria, 247, 249
Estonian Cargo and Passenger S.S. Line *v.* S.S. Elise and Messrs. Laane and Baltser, 268
Eustace *v.* Eustace, 306–8
Expenses Case: *see* Certain Expenses of the United Nations
Ex-Rajah of Coorg *v.* East India Company, 247

Fagernes, The, 294
Faithful *v.* The Admiralty, 136
Federation of Pakistan *v.* Moulvi Tamizuddin Khan, 138
Firma E. Kampffmeyer and others *v.* E.E.C. Commission, **311–16**
Firma Kurt E. Becher *v.* E.E.C. Commission, 312, 314, 316
Former Officials of the Governing Commission of the Saar Territory, 133
Foster *v.* Secretary of State for India in Council, 247
Free Zones Case, 125
Fryer *v.* Bernard, 229

Gaekwar of Baroda State Railways *v.* Hafiz Habib-al-Haq, 237
Galakis Case, 14–15
Genocide: *see* Reservations to the Convention
Gerasimo, The, 237, 263
German Settlers in Poland Case, 248
Germany *v.* Reparation Commission, 126
Gold Looted by Germany from Rome, 133, 147
Guaranty Trust Co. *v.* United States, 11

Haile Selassie *v.* Cables and Wireless Ltd., 245
Hangkam Kwingtong Woo *v.* Lin Fan Fong, 236
Hannes *v.* Kingdom of Roumania Monopolies Institute, 17, 246
Harper *v.* Home Secretary, 130–1, 133, 139
Hoani te Heu Heu Tukino *v.* Aotea District Maori Land Board, 250
Hogg *v.* Toye & Co. Ltd., 292
Home Ins. Co. *v.* Dick, 269
Hull *v.* M'Kenna, 233
Humblet Case, 316
Hungarian Optants: *see* Agrarian Reform in Roumania
Huntington *v.* Attrill, 234, 242
Hyde *v.* Hyde, 300

Ibralebbe *v.* R., 231, 233, 236
Imperial Japanese Government *v.* P. and O. Steam Navigation Co., 245
Indyka *v.* Indyka, **302–5**
Interhandel Case (Switzerland *v.* United States), 32
Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania, 23
Interpretation of the Treaty of Lausanne, 197
Island of Palmas Arbitration, 256
Island of Timor Arbitration, 135

Juan Ysmael *v.* Government of Republic of Indonesia, 241, 245
Jupiter, The, 245

Kahan *v.* Federation of Pakistan, 16–17
Kernot (An Infant), *In re*, 124
King of the Hellenes *v.* Bostrom, 268
Kossekechatko *v.* Attorney-General of Trinidad, 261

Labour Conventions (I.L.O.) Case, 260
Labrador Boundary, *In re*, 135, 139, 234–5, 253
Lawless Case, 133
Lazard Bros. and Co. *v.* Midland Bank Ltd., 301
Le Mesurier *v.* Le Mesurier, 303
Lena Goldfields Ltd. *v.* Soviet Government, 7–8
Linguistics Case, 131–2
Lord Advocate *v.* Clyde Navigation Trustees, 255
Losinger & Cie. S.A. Case (Switzerland *v.* Yugoslavia), 15, 26–9, 34
Lotus, The, 140
Lutcher S.A. *v.* Inter-American Development Bank, 170

Mackender *v.* Feldia A.G., **298–300**
Madzimbamuto *v.* Lardner-Burke N.O. and Others, 134
Maritime Safety: *see* Constitution of the Maritime Safety Committee
Maxine Footwear Co. Ltd. *v.* Canadian Government Merchant Marine Ltd., 261
Merricks *v.* Heathcoat-Amory and the Minister of Agriculture, Fisheries and Food, 130
Minquiers and Ecrehos Rocks Case, 134, 232
Miriella, The, 269
Molvan *v.* Attorney-General for Palestine, 234, 242, 244, 247, 262
Monetary Gold: *see* Gold Looted by Germany
Moor *v.* Attorney-General for the Irish Free State, 259
Morocco: *see* Nationality Decrees *and* Right of U.S. Nationals

Nadan *v.* R., 233
National Bank of Australasia Ltd. *v.* Scottish Union and National Insurance Co. Ltd., 243
National Bank of Greece *v.* Metliss, 155, 163
National City Bank of New York *v.* Republic of China, 16
National Sailors' and Firemen's Union *v.* Reed, 138
Nationality Decrees in Tunis and Morocco, 256
Nelson *v.* Bridport, 301
Nicaragua and Honduras, Boundary Arbitration, 135
Niederreinsche Bergwerks-Aktiengesellschaft *v.* The High Authority, 138
Nireaha Tamaki *v.* Baker, 253
Nissan *v.* A.-G., 136
North Atlantic Fisheries Arbitration, 138
Northern Cameroons Case, 23, 125–7, 132–3, 136
Nottebohm Case (Liechtenstein *v.* Guatemala), 62, 134, 139

Odessa, The, 235
Ohochuku *v.* Ohochuku, 300
Okeyan and others *v.* Adele, 247, 252
Orion Cia. Española de Seguros *v.* Belfort Maats, 37

Papayanni *v.* Russian Steam Navigation and Trading Co., 236
Paris, *In re*, 243
Parkasho *v.* Singh, **300–2**
Peace Treaties: *see* Interpretation of Peace Treaties
Peters *v.* Peters, 302, 305
Petroleum Developments (Trucial Coast) Ltd. *v.* The Ruler of Abu Dhabi, 7
Piracy *jure gentium, In re*, 235
Plaumann Case, 313
Post Office *v.* Estuary Radio Ltd., **295–8**
Preah Vihear: *see* Temple of Preah Vihear
Prescott *v.* Birmingham Corporation, 140
Procurator-General in Egypt *v.* Deutsches Kohlen-Depot Ges., 261

Queen, The, *v.* Hemapala, 231

R. (Adoption), *In re*, 309
R. *v.* Criminal Injuries Compensation Board, 137
R. *v.* George, 258
R. *v.* Kent Justices, *Ex parte* Lye, **293–5**, 295–6
R. *v.* Keyn, 293, 295
R. *v.* Martin, 272
R. *v.* Naylor, 272
R. *v.* Sikyea, 258
R. *v.* White and Bob, 258
Radio-communication in Canada, Regulation and Control, *In re*, 259–60
Radio Corporation of America *v.* The National Government of the Republic of China, 7, 134
Railway Traffic between Lithuania and Poland, 197
Rajah Salig Ram *v.* Secretary of State for India in Council, 247
Rannveig, The, 236, 261
Rederiaktiebolaget 'Amphitrite' *v.* The King, 136
Regno di Grecia *v.* Gamet *et al.*, 269
Reparation for Injuries Suffered in the Service of the United Nations, 122, 138–9, 150, 158, 166
Reservations to the Convention on the Prevention and Punishment of . . . Genocide, 63, 138

Right of United States Nationals in Morocco, 256
Rosemary, The, 269
Ross-Smith *v.* Ross-Smith, 307
Roumanian, The, 233

Saar Territory: *see* Former Officials of the . . . Saar Territory
Sabally and N'Jie *v.* H.M. A.-G., 140
St. Catherine's Milling and Lumber Co. *v.* The Queen, 257
Salem Case (Egypt *v.* United States), 3, 32
Salomon *v.* Commissioners of Customs and Excise, **291–3**, 296
Sammut *v.* Strickland, 248, 251
Sammy *v.* Birkbeck College, 124–5
Sapphire International Petroleum Ltd. *v.* National Iranian Oil Company, 8, 18, 24–5, 37
Saudi Arabia *v.* Arabian American Oil Co., 9–10
Schiffahrt-Treuhand GtmbH *v.* H.M. Procurator-General, 263
Secretary of State for Foreign Affairs *v.* Charlesworth, Pilling & Co., 238
Secretary of State for India in Council *v.* Bai Rajbai, 250
Secretary of State for India in Council *v.* Kamachee Boye Sahaba, 247–8
Secretary of State for India *v.* Sardar Rustam Khan, 252
Secretary of State for India *v.* Sri Rajah Chellikani Rama Rao, 255
Senembah Maatschappij N.V. *v.* Bank of Indonesia *et al.*, 269
Shapleigh *v.* Mier, 268
Sigcau *v.* Sprigg, 249
Sinclair *v.* Sinclair, **305–8**
Sinha Peerage Claim, 300–1
Sirdar Baghwan Singh *v.* Secretary of State for India in Council, 249
Smyrna, The, 262
Sobhuza II *v.* Miller, 246, 252
Société Anonyme Brasserie de Haecht *v.* Consorts Wilkin-Janssen, **320–3**
Société Anonyme Cimenteries C.B.R. Cementbedrijven N.V. and others *v.* E.E.C. Commission, **316–20**
Société Anonyme Usines Émile Henricot and others *v.* High Authority, 318
Société Commerciale de Belgique *v.* Greece, 3, 30–1
Société des Usines à Tubes de la Sarre *v.* High Authority, 318–19
Southern Rhodesia, *In re*, 248, 251, 257
South-West Africa Cases, 116–20, 132–3, 135–7, 142, 232
South-West Africa (Voting Procedure), 99
Sowa *v.* Sowa, 300
Starkowski *v.* Attorney-General, 301
State of Gujarat *v.* Vora Fiddali, 246
State of South Australia *v.* State of Victoria, 254
Südmark, The, 261
Sultan of Johore *v.* Abubakar Tunku, 237, 245, 263
Svit Impresa Nazionale *v.* Cipera, 269

Talinna Laevanhisus A/S *v.* Estonian State S.S. Line, 268
Temple of Preah Vihear Case, 254
Thorne *v.* University of London, 125, 133
Tijanic *v.* Tijanic, 302, 305
Toepfer *v.* E.E.C. Commission, 312, 313–314
Travers *v.* Holley, 303–5
Treaty of Lausanne: *see* Interpretation of the Treaty of Lausanne
Tunis: *see* Nationality Decrees

United Engineering Workers' Union *v.* Devanayagam, 26
United States *v.* Cordova, 272
United States *v.* Percheman, 246

Vajesingji Joravarsingji *v.* Secretary of State for India, 250
Vereenigte Deli Matschappijen N.V. Senembah Mij. *v.* Deutsche-Indonesische Tabak Ges., 269
Victory Transport Inc. *v.* Comissariat General, 16
Vita Foods Products Inc. *v.* Unus Shipping Co. Ltd., 300

Wagg, Helbert, *In re*, 269
Walker *v.* Baird, 258
Ward *v.* Ward, 307
Wells *v.* Wells, 307
West Rand Central Gold Mining Co. *v.* R., 234
White Star Line and U.S. Mail Steamers Oceanic Steam Navigation Co. Ltd. *v.* Comerford, 292

Zamora, The, 234–5
Zeiss (Carl) Stiftung *v.* Rayner and Keeler Ltd., 139

INDEX

Adoption, child's domicile, 309–10
Aireraft, crimes committed on board:
Tokyo Convention Act of 1967, 271–7
commander of the aircraft, powers, 271–2, 274–6
disembarkation of offenders, 274–6
duties and responsibilities, 274–6
exercise of powers, 275–6
jurisdiction of, powers and duration, 271–2, 275
restraint of persons on board, 274–6
evidence, 274
extradition, 277
jurisdiction over crimes, 271–4
'British-controlled aircraft', definition, 273
commander of the aircraft, 271–2
crew of the aircraft, 272
criminal law, application of English, 272–3
double jeopardy and, 273
flag, law of, 272–3
'in flight', definition, 273
joint air transport, registration, 273–4
landing while offender on board, 272
military aircraft, 273
proceedings in England, safeguards, 273
Tokyo Convention of 1963, 271–2
piracy, 276–7
Geneva Convention on the High Seas, application to aircraft, 276–7
'hi-jacking', 277
Tokyo Convention of 1963, 271–2
Aliens, contract between a State and an alien: *see* International arbitration
America, American States:
Inter-American Peacekeeping Force: *see* Regional agencies
Organization of American States (O.A.S.): *see* Regional agencies
Antarctic Treaty, 279
Arab States, League of, 176–7, 179
Arbitration: *see* International arbitration

Bays, definition and status, 255–6, 295–7: *see also* Territorial sea
Boundaries, 135–6, 138–9, 253–4
justiciability of disputes and, 135–6, 138–9
settlement, 253–4

Chapultepec Act, 175
Conflict of laws, 298–300; *see also* Adoption; Divorce; Foreign law, proof of; International arbitration, State contracts and; International corporations and national law; Marriage; Municipal law; Separation, judicial
contractual choice of forum and choice of law, 298–300
illegality and voidability issues, 298–9
proper law of contract, 299–300
Contracts, State: *see* International arbitration
Copyright Convention, 151
Corporations: *see* International corporations
Crimes on board aircraft: *see* Aircraft
Cuba, missiles crisis and O.A.S. actions, 175–227 *passim*: *see also* Regional agencies
Currency, State jurisdiction and, 242–3

Denial of justice, refusal of arbitration as, 26–9, 33, 37: *see also* International arbitration
Diplomatic protection: *see* Immunities and privileges
Divorce, 302–5: *see also* Separation, judicial
jurisdiction, 302
recognition of foreign, 302–5
bases for recognition, new, 303
domicile, law of, and, 303–5
'real and substantial connection' doctrine, 304–5
Dominican Republic, O.A.S. action in civil war of 1965, 203–13, 219: *see also* Regional agencies

European Commission of Human Rights: *see* Human rights
European Communities: *see* European Economic Communities
European Convention on Human Rights: *see* Human rights
European Court of Human Rights: *see* Human rights
European Economic Communities, decisions of the Court, 311–23
restrictive practices, 316–23
agreement, consideration of effect, 321–2
agreement, establishing nullity, 320–1
decision, relevance of concept, 317–19
E.E.C. law, restrictive practices in, 316, 320–3
E.E.C. Treaty, interpretation, 320–3
recours en annulation review, 316–20

European Economic Communities (*cont.*)
tortious liability of the E.E.C., 311–16
administrative acts of member States and E.E.C. law, 312–13
damages, categories, 314–15
faute de service, tortious liability and, 313–15
laws of member States, differences, 313, 315
Ex aequo et bono recommendations, 125
Exhaustion of local remedies: *see* Local remedies
Exterritoriality, 238
Extradition, 277

Federation, Federal States, 138–9
Force, use of, 197–204, 222
nationals, use of force to protect, 204
quarantine, 197–204, 222
Foreign law, proof of, 265–70
constitutionality of foreign law, 267–9
forum, court of, scrutiny by, 267–9
lex causea, determination, 268
content, process of ascertainment, 265
executive acts of foreign governments, 269–70
forum, 267–9
constitution of, and choice of law rule, 269
court of, scrutiny of foreign law by, 267–9
incorporation of foreign law provisions, 270
lex fori and, 269
rules, criteria of applicability, 265–6
content of rule, 265–6
validity of, in the context of foreign constitution, 265–6
validity, 265–7
challenge, 265
constitutional law of the foreign country and, 267
scrutiny by the court, 266–7
France: *see* Peace Treaty of Regensburg

G.A.T.T.: *see* Tariffs and Trade, General Agreement
General principles of law, 150, 234
Good faith principle, 122
Grotius, 88–90

Hague Convention on Permanent Court of Arbitration, 1907, 1–2
High seas, 244–5, 276–7
freedom, 244
Geneva Convention of 1958, application to aircraft, 276–7
jurisdiction over ships, 244–5
Human rights, 127–9, 131–2, 137–8
European Commission, 137
European Convention, 138
European Court, 127–9, 131–2
application, withdrawal of, 127–9
jurisdiction, domestic, reserved domain and Court's jurisdiction, 131–2
ultra vires doctrine and, 132
justiciability of disputes, 127–9, 131–2, 137–8

Immunities and privileges, 15–19, 36, 131–2, 136, 139, 162–3, 169–74, 236, 245–6
diplomatic protection and justiciability, 139
international corporations, immunities and privileges of, 162–3, 169–74: *see also* International corporations
justiciability of disputes and, 131–2, 136
State contracts and international arbitration, 15–16, 36: *see also* International arbitration
States, extent of immunities from process, 236, 245–6
Incorporation: *see* International corporations *and* Treaties
Inter-American Peacekeeping Force, 203, 207–13: *see also* Regional agencies
International arbitration, 1–2, 4, 6–15, 19, 25, 29, 36–7: *see also* International arbitration, State contracts and
Hague Convention on Permanent Court, 1–2
International Disputes, Rules of Arbitration and Conciliation, 12
lex arbitri principle, 4, 6–12, 15, 19, 25, 29, 36–7
Permanent Court of Arbitration, 1–2, 12–13
Procedure, Rules of Arbitral, 1–2
International arbitration, State contracts and, 1–37: *see also* International arbitration
arbitrator, failure to appoint or withdrawal, 19–27, 36–7
appointor, relevance of identity, 20–2, 24
arbitration clause and, 19–20, 22–6
lex arbitri and, 19, 25
party's failure to appoint, 24–6
State's refusal to appoint, 25–6, 36–7
third person's failure to appoint, 19–24, 36–7
withdrawal from proceedings, 26–7
awards, 3, 11–12, 14–15, 18–19, 30–2, 35–7
enforceability, 3
enforcement, 15, 18–19, 36
failure to comply with, 30–2, 35–7
immunity, enforcement of award and, 15, 18–19, 36
nationality of, 11–12, 14

International arbitration, State contracts and (*cont.*)
commercial arbitrations, proposed internationalization, 5–6
concession agreements, 8–10, 16–17
immunity and, 16–17
lex arbitri and, 8–10
denial of justice, refusal of arbitration as, 26–9, 33, 37
arbitration clause, repudiation, 27–8
legislation, general, 28–9, 37
legislation, specific, against contracting alien, 28
lex arbitri and, 29
State's refusal to co-operate, 26–8, 33, 37
exhaustion of local remedies, 31–7
award, failure to implement and, 31–2, 35–7
prior to arbitration, relevance, 31–3
State's refusal to co-operate and, 31, 33–7
immunity, 15–19, 36
award, enforcement of, and, 15, 18–19, 36
concession agreements, relevance of nature, 16–17
contract, relevance of nature, 15–16
submission agreement and, 15–18
waiver, arbitration clause and, 16–18, 36
institutions, arbitration under auspices of, 12–14, 36
International Bank of Reconstruction and Development, 13–14
International Chamber of Commerce, 12
Permanent Court of Arbitration, 12–13
international wrong, failure to comply with award as, 30–1, 37
Investment Disputes, Convention on Settlement, 31–3
lex arbitri principle, 4, 6–12, 15, 19, 25, 29, 36–7
applicability, 6–7, 12, 36
arbitrator, failure to appoint, 19
award, nationality of, 11–12
concession agreement, 8–10
denial of justice and, 29
deviations from, 7–10 *passim*
'international' arbitration, evidence of intention, 6–7
submission, validity of, 15
parties subject to jurisdiction of different States, arbitration between, 1, 4–6
Permanent Court of Arbitration, 1–2, 12–13
Procedure, Model Rules, 1–2
responsibility of States, 25–8, 31, 33–7
arbitrator, refusal to appoint, 25–6, 36–7
denial of justice and, 26–8, 33, 37
exhaustion of local remedies and, 33, 35–7
State and private person, arbitration between, 6–12, 36: *see also subheading* lex arbitri, *above*
States, arbitration between, 1–4, 36
Arbitral Procedure, I.L.C. Rules, 1–2
awards, enforceability, 3
compromis, 1–3
Hague Convention of 1907, 1–2
international law and, 2–3
municipal law and, 2
responsibility of States, 3–4
submission agreement, 14–18
enforcement, 15–18
validity, 14–15
types of arbitration, 1
unilateral arbitration, 24–6, 37
International Bank for Reconstruction and Development, 13–14
International Chamber of Commerce, 12
International convention, municipal law and, 291–3, 295–8 *passim*
International corporations and national law, 145–74
authority to act, source of, 164, 168–9, 174
constitutions of corporations, 168–9
officials, liability for acts of, 169
rules and regulations, internal, 169
scope, 168
treaty establishing corporation, 168–9
ultra vires doctrine and, 169
capacity to act, 164–8, 174
constitutions of corporations, 165–8
legality of acts, decision on, 167–8
lex loci actus and, 164–5
liability for tort, 166–7
personal law, capacity governed by, 164
scope, 165–6
ultra vires doctrine and, 164, 166–7, 174
validation, retrospective, 167
categories of corporations called 'international', 145–9, 174
international, created by treaty, 148–9, 174
national, agreed upon or contemplated in a treaty, 145–8
national, operating internationally, 145
copyright protection, 151
corporate status, law governing, 149, 160–4, 174
immunity and, 162–3
insolvency, 161–2, 174

International corporations (*cont.*)
corporate status (*cont.*)
liabilities, responsibility for, 160–1, 174
mergers and amalgamation, 162–3, 174
ordre public and, 163
shares, transfer and repurchase, 161, 174
general principles of law and, 150
immunities and privileges, 162–3, 169–74
arbitration proceedings, 171
corporate status and, 162–3
extent of, 169–71, 174
extention of, 171–2
incorporation, 170
judicial proceedings, scope of immunity from, 170–1
non-member States, immunities in, 171–4
States, comparison with, 172–3
treaty establishing corporation, 169–170, 174
incorporation, law of, 154–7 *passim*
international law, degree of dependence on, 149–50
international persons, corporations as, 149–50, 152–3, 159–60, 171, 174
law governing corporations, 149–52, 154–60, 163, 174
activities, place of, 156
constitutions of corporations, 153–4, 156
incorporation and, 154–7 *passim*
multi-national principle, 156
personal law, 154–7, 174
personality, legal, 158–60, 174
seat as point of contact, 151–2, 155–6
municipal law, status of corporations in, 150–7, 159–60, 163, 174
contracts governed by municipal law, 150
incorporation and, 154–7 *passim*
legal position of corporations, 150–3, 159–60
municipal legislation and, 159–60
nationality of corporations, relevance to status, 150–1, 174
personal law and, 154–7, 163, 174
recognition and, 154
seat of corporation, test of, 151–2, 155, 174
status, factor determining, 153–4
nationality of corporations, 150–1, 174
personal law, 151–2, 154–7, 163–4, 174
capacity and, 164
incorporation, 154–7
seat as point of contact, 151–2, 155–6
status, 154–7, 163, 174
personality, legal, 152–4, 158–60, 163–4, 174
constitutions, relevance, 158–9
definition, 158
international personality and, 158, 174
municipal legislation and, 159–60
recognition, 158
treaty of establishment, 158
recognition by States, 152–4, 158, 174
constitutive and declaratory view of, relevance, 153
existence, condition of, 152–3, 174
municipal law and, 154
personality, legal, and, 158, 174
responsibility, 150, 160–1, 174
liabilities, responsibility for, 160–1, 174
rules, applicability, 150
seat, 151–2, 155–6, 174
law governing corporations and, 151–152, 155–6
position in law, 151–2, 156, 174
treaties, ability to enter into, 150
ultra vires doctrine, 164, 166–7, 169, 174
International Court of Justice, 107–8, 116–21, 231–3, 254–6
expenses, budget approval by G.A. and, 107–8, 116–21
Judicial Committee of the Privy Council, comparison with, 231–3, 254–6
justiciability of disputes and: *see* Justiciability
opinions, requests for: *see* Justiciability
International law, 149–50, 221–7, 234
general principles of, 150, 234
international corporations, degree of dependence on, 149–50
Judicial Committee of the Privy Council and: *see* Judicial Committee
regional agencies, action by, 221–7: *see also* Regional agencies
International Law Commission, 1–2, 48–62, 66–7, 256
Arbitral Procedure, Model Rules, 1–2
treaties, some draft articles on the law 48–62, 66–7: *see also* Refugees
International organizations, 230, 262–3
International persons, corporations as, 149–50, 152–3, 159–60, 171, 174
International tribunals, 140–2

Judicial Committee of the Privy Council and international law, 229–63
composition, 229–31
exterritoriality, 238
history of, 229–31
immunities from process, extent of State, 236, 245–6
independence of States and, 230, 236–8
exterritoriality, 238
protected States, position of the Crown, 238–40

Judicial Committee of the Privy Council and International law (*cont.*)
independence of States and (*cont.*)
sovereignty, absolute, 237–8
sovereignty, internal, 236
territories, status of foreign, 237–8
international law, as denoted by the Committee, 233–6
constitutional law, special rule, 234
customary law, 235–6
domestic law, rules incorporated in, 234–5
general principles of law, 234
rule, need for proof of existence, 235
rules of, generally accepted by States, 233–4, 236
international organizations, 230, 262–3
jurisdiction of the Committee, 229–31
jurisdiction, State, extent of, 230, 236, 242–5, 255–6
criminal jurisdiction, 242
currency, 242–3
exercise of, and basis, 242
high seas freedom and, 244
ships, jurisdiction over, 244–5
territorial, 242–3
territorial sea, 244–5, 255–6
practice of the Committee, 231–3
I.C.J., comparison with, 231–3
opinion, delivery of a single, 231
opinions, dissenting, 231–2
questions, abstract, approach to, 232–233
stare decisis rule, 231
recognition of foreign governments, 230, 236, 240–2
aircraft flown into Hong Kong, case of, 240–1
goods, title to, and recognition, 241–2
governments later overthrown, sale of public property, 241–2
retroactive recognition, 241
territory, acquisition of title, 230, 246–256
act of State doctrine, 246–8, 253
bay, status, 255–6
boundary settlement, 253–4
Crown title, unitary conception of, 246–7, 249, 253
maps, admissibility as evidence, 254–5
property rights, 248–53 *passim*
rights, existing, 248, 253
rights, modification and extinguishment, 248–53
territorial claims, 253–5
territorial sea, status, 255–6
treaties, 230, 256–61
agreements, public, as treaties, 257
capacity question, 256–7
concessions, private, 257
implementation of, impact of constitutional law, 258–60
incorporation of treaties, 258
interpretation, 261
obligations under treaties, 257–8
war, 230, 263
belligerent rights, 263
military occupation, 263
Justiciability of disputes . . . in international relations, 123–43
admissibility, 123, 136
area of, 136–7, 141–2
boundaries, issues concerning, 135–6, 138–9
courts, legislative role of, 138
diplomatic protection, 139
economic issues as justiciable matter, 138
ex aequo et bono recommendations, 125
federations and, 138–9
general interest, concept, 137
Human Rights Commission, complaints procedure, 137
Human Rights Convention, 138
Human Rights Court, 127–9, 131–2
application, withdrawal, 127–9
domestic jurisdiction, reserved domain, 131–2
ultra vires doctrine and, 132
immunity, justiciability and, 131–2, 136
international tribunals, irrevocability of decisions, 140–2
judgment, declaratory, 137
judicial function, 126, 135–8, 141
aspects of, 126, 135–6
broadening of, factors in favour, 137–8, 141
justiciable matters, equivalents in municipal law, 124, 138–42
boundaries, 138–9
decisions, means of reversal, 139–42
diplomatic protection, 139
personality, legal, 139
ultra vires doctrine and, 140–1
legal dispute concept, 136
local remedies rule, 124
non-justiciability, judicial tactics and, 136–7
non-justiciability, reasons given for, 124–36, 142
application, collateral reason for, 133
forum, availability of a more suitable, 124–5
issue: formulation, 134, 142; nature, 133–4; political appreciation of, 132–3
legislative tasks, refusal to undertake, 134–6
party absent from proceedings, 133

Justiciability of disputes (*cont.*)
non-justiciability (*cont.*)
personality of international persons, 134
political settlement, unwillingness to prejudice, 125–6
relief sought, relevance of its effectiveness, 126–30
ultra vires doctrine and, 129–32
non-liquet, 123
opinions, requests for, and justiciability, 136–7
personality, legal, and, 134, 139
in municipal law, 139
international persons, 134
policy, justiciability as a matter of, 141–2
political aspects of, 124–6, 132–3, 138, 142
justiciable matter, political issues as, 138
non-justiciability, political reasons for, 125–6, 132–3
U.N. political organs, 124–5, 142
State, consent of, and jurisdiction, 133
supervision, concept of international, 137
treaties, teleological principle of interpretation, 135
ultra vires issues, 129–32, 137–8, 140–1, 143
U.N. political organs and justiciability, 124–5, 142

Latin American States, action by O.A.S.: *see* Regional agencies
League of Nations, 92–3, 137
covenant, 92–3
international supervision concept, 137
Liability, tortious, of the E.E.C.: *see* European Economic Communities
Local remedies, 31–7, 124
exhaustion of, 31–7: *see also* International arbitration
rule, 124

Marriage, polygamous, foreign legislation and, 300–2
foreign law as evidence, 301–2
nature of marriage, time at which to judge, 300–1
Municipal law, 124, 138–43, 150–7, 159–160, 163, 174, 291–8
international convention, relation to, 291–3
international corporations, status in municipal law, 150–7, 159–60, 163, 174: *see also* International corporations
justiciability of disputes and, 124, 138–143: *see also* Justiciability of disputes
State contracts and international arbitration: *see* International arbitration
territorial sea in international and municipal law, 293–8: *see also* Territorial sea

National law, international corporations and: *see* International corporations
Nationality, of international corporations, 150–1, 174
Non-liquet, 123

Ordre public, 163
Organization of American States (O.A.S.): *see* Regional agencies
Outer Space Treaty of 1967, 278–89
Declaration of Legal Principles . . . in the Exploration . . . of Outer Space, 279–81, 288
effect, legal, 279–81 *passim*
parentage, 278
place of, in the development of international law, 278, 288–9
provisions of the Treaty, 282–9
co-operation, international, 285–6
disarmament measures, 283–5
free and common use, 282–3
governments depositary of the Treaty, 287–8
international organizations, 286
weapons of mass destruction in orbit, 288
withdrawal clause, 288
text, sources of, 278–9, 288–9
Antarctic Treaty, 279
G.A. Resolution 1884 (XVIII), 279, 288
G.A. Resolution 1962 (XVIII), 279, 288
Test Ban Treaty, 279, 287–8

Peace, peace-keeping, 203–13, 219: *see also* Peace Treaty of Regensburg
Inter-American Peacekeeping Force, 203, 207–13
O.A.S., peace-keeping action in Dominican Republic, 203–13, 219
Peace Treaty of Regensburg, refusal to ratify in 1630, 71–90: *see also* Peace, peace-keeping
dispute, legal and moral issues, 71, 85–8, 90
good-faith principle, 85–6
Grotius, his subsequent intervention, 88–90
instructions to agent, validity of treaty and, 86–8
law of nature and, 86
obligations, moral, 85–6
plena potestas, significance and scope, 87–8, 90

Peace Treaty of Regensburg (*cont.*)
drafting of the Treaty, 76–83, 86–7, 89
credentials, Brulart's and Père Joseph's, 77–8
instructions, Brulart's 76–8, 83
issues between France and the Habsburgs, 76
negotiations, 79–83
powers, Brulart's, 78–81, 86–7, 89
signing of the Treaty, 83
historical context, 71–6
Aulic Council, 74
Cambrésis, Treaty of, 75–6
Mouzon, Peace Treaty of, 71–4, 76
Münster Peace Conference, 71
ratification, refusal, 83–5
Polygamous marriage: *see* Marriage
Privileges: *see* Immunities and privileges
Privy Council: *see* Judicial Committee of the Privy Council

Quarantine, action by O.A.S., 199–203, 219–20, 222: *see also* Regional agencies

Recognition of international corporations: *see* International corporations
Recognition of States, 230, 236, 240–2
foreign governments, Judicial Committee on, 230, 236, 240–2
goods, title to, and recognition, 241–2
Refugees, Protocol of 1967 relating to the status, 39–70
adoption of draft Protocol, objections to, 46–7, 57
establishment of Protocol, 41–8, 56–7, 64
Colloquium of 1965, 41–5
procedure, 56–7, 64
treaties, I.L.C. articles, and, 57
U.N. Economic and Social Council, submission to, 44–5
U.N. General Assembly, action of, 45–8
reservations to Protocol, 61–2
Status of Refugees, U.N. Convention of 1951, 39–45, 49–51, 57–64
Colloquium of 1965, 41–5
'convention', meaning of term, 49–50
definition of 'refugee', 39–41
Protocol of 1967 and the Convention, relationship between, 57–64
reservations to, 61–2
revision, provision for, 42, 57
suspension or termination, 62
term 'refugees', meaning, 39–45, 62–3
amendment, 41–5, 62–3
definition of 'refugee', 39–41, 45
interpretation, 40–1
limitations, 40–1
text of Protocol, 67–70
treaties, adoption of, and the Protocol, 52–7, 64
I.L.C. articles, 53–7
resolutions, wording, 52–3, 64
treaties, amendment of, and the Protocol, 57–62, 64
Convention of 1951, 57, 59–62
I.L.C. articles, 58–9
successive treaties, 60–2
treaties, U.N. practice in establishing, and the Protocol, 50–7, 64–6
adoption, wording of resolutions, 52–3, 64
drafts prepared by I.L.C., 51–2
Economic and Social Council, competence, 50–1, 65
General Assembly practice, 50–3, 64
Protocol, procedure for establishment, 56–7, 64
voting procedure, 53
treaty, multilateral, Protocol as, 49–50, 63
Regensburg: *see* Peace Treaty of Regensburg
Regional agencies (special reference to O.A.S.), enforcement action by, 175–227
'agency', regional, definitions, 177–80
American States, Organization of (O.A.S.), establishment, composition and aims, 175–7, 179, 182–5, 210, 226
Chapultepec Act, 175
domination of, by U.S.A., 210, 226
Latin American States, objectives, 175–6
regional agency, O.A.S. a clear example of, 179
Security Council's control and, 181–3
self-defence, collective, 176
U.N. Charter, Art. 53, 181–5 *passim*
force, use of (Cuban missiles crisis), 197–204, 222: *see also subheading* quarantine, *below*
international law, action by regional agencies and, 221–7
autonomy for agencies, 226
legal basis of action, 222–4
power of agencies, growth, 224–5
precedent, danger in creating, 223–4
sovereign equality of States and, 226–7
spheres of influence, traditional, 225–7
legality questions, 189–97, 199–203, 210–13, 222
economic sanctions, motives, 192–3
'enforcement action' sanctions as, 194–7
Peacekeeping Force, Inter-American, 210–13

Regional agencies (*cont.*)
legality questions (*cont.*)
quarantine, 199–203, 222
Rio Treaty, sanctions under, 192–4
suspension of Castro régime, 193–4
U.N. Charter, sanctions under, 194–7
nationals, use of force to protect, 204
non-members, capacity to take action against, 219–21
enemy States, former, 220
quarantine, 219–20
Security Council and, 221
self-defence, collective, and, 220
peace-keeping action (Dominican Republic, civil war of 1965), 203–13, 219
cease-fire appeals, 206–7, 209–10
force, use of, to protect nationals, 204
Inter-American Peacekeeping Force, 203, 207–13
neutral refuge zone, 207–8
O.A.S. action, 206–13
political motives for intervention, 204–5
Security Council's action, 209–10
United States intervention, 203–6, 210–11
Peacekeeping Force, Inter-American, 203, 207–13
contingents, contribution of, 208, 210
domination of, by U.S.A., 210
establishment, 203, 207
legality, 210–13
objectives, 208–9, 211
U.N. peace-keeping forces and, 208, 211–13
quarantine, 199–203, 219–20, 222
enforcement action, regional, and, 201–3, 219
force, quarantine as threat or use of, 199–200
legality question, 199–203, 222
Security Council and, 202–3
self-defence as justification, 200–2
ships of non-member States, 219–20
U.N. Charter and, 199–201
regional arrangements, 176–83, 221–7 *passim*
alliances, military, 179–80
definitions, 177–81
non-regional arrangements and, 181–2
powers of, under Charter, 181
regional agencies and, 177
self-defence, collective, 176, 181
stability, international, and, 221–7 *passim*
treaties, bilateral, 180
U.N. Charter on, 177
U.N. practice and, 181–3
Rio de Janeiro Treaty of 1947, 188, 192–4, 202
sanctions, non-military, 185–97, 217, 219
Cuba, O.A.S. sanctions against, 190–192, 219
Dominican Republic, O.A.S. sanctions against, 188–90
'enforcement action', interpretations, 194–7, 217
legality of O.A.S. sanctions, 192–7
Rio Treaty, sanctions under, 192–4
Security Council and, 185–92, 194–7
U.N. Charter, relevant provisions, 185–8
U.N. Charter, sanctions under, 194–7
San Francisco Conference, 175–7
Security Council, 181–3, 185–92, 194–7, 202–3, 209–19, 221
authorization and acquiescence, 216–219
enforcement action, authorization for: G.A. Uniting for Peace Resolution and, 214–16; monopoly of Security Council, 215–16; time of, 214
O.A.S., establishment of, and Security Council's control, 181–3
peace-keeping action by O.A.S., 209–210
Peacekeeping Force, debates on the legality, 210–13
quarantine, authorization for, 202–3
regional agencies' action against non-members, 221
regional agencies, autonomy for, 225
self-defence, collective, 176, 181, 187, 220
Responsibility of States, 25–8, 31, 33–7, 150
arbitration, State's refusal to co-operate, 25–8, 31, 33–7: *see also* International arbitration
rules, applicability to international corporations, 150
Restrictive practices: *see* European Economic Communities, decisions of the Court
Rio de Janeiro Treaty of 1947, 188, 192–4, 202

Sanctions, non-military, 185–97, 217, 219: *see also* Regional agencies
San Francisco Conference, 175–7
Sea: *see* Bays; High seas; *and* Territorial sea
Self-defence, collective, 176, 181, 187, 220
Separation, judicial, 305–8: *see also* Divorce
domicile, wife's, 308
jurisdiction, bases of, 305–8
Matrimonial Causes Acts of 1857, 1937 and 1965, 306, 308

Separation (*cont.*)
residence, jurisdictional test in terms of, 307–8
Ships, jurisdiction over, 244–5
States, 1–37, 133, 152–4, 158, 174, 230, 236–8, 242–56
act of State doctrine, 246–8, 253
contracts, State, 1–37: *see also* International arbitration
immunities from judicial process, 236, 245–6
independence of States, Judicial Committee on, 230, 236–8
international corporations, recognition by States, 152–4, 158, 174: *see also* International corporations
jurisdiction, 133, 230, 236, 242–5, 255–6
consent of the State and, 133
extent of, 230, 236, 242–5, 255–6: *see also* Judicial Committee
recognition: *see* Recognition of States
responsibility: *see* Responsibility of States
territory, acquisition of title by States, 230, 246–56: *see also* Judicial Committee

Tariffs and Trade, General Agreement on, 137
Territorial sea, 244–5, 255–6, 293–8
baselines, 293–8
bays, definition and status, 255–6, 295–7
Convention on Territorial sea and Contiguous zone, 296–7
Territory, 230, 242–3, 246–56
acquisition of title, 230, 246–56: *see also* Judicial Committee
territorial jurisdiction of State, 242–3
Test Ban Treaty, 279, 287–8
Tokyo Convention Act, 1967: *see* Aircraft, crimes committed on board
Tokyo Convention of 1963, 271–2: *see also* Aircraft, crimes committed on board
Travaux préparatoires, U.N. Charter, Art. 17, 92–7, 120
Treaties, 48–62, 64–7, 71, 86–8, 90, 135, 145–50, 168–70, 174, 256–61
amendment, 57–62, 64: *see also* Refugees
capacity question, 256–7
establishing treaties, U.N. practice, 50–7, 64–6: *see also* Refugees
implementation, impact of constitutional law, 258–60
incorporation of, 258
international corporations, 145–50, 168–170, 174
ability to enter into treaties, 150
agreed upon or contemplated by treaty, 145–8
authority to act, treaty a source of, 168–9
created by treaty, 148–9, 174
immunities of, defined by treaty, 169–170, 174
interpretation, teleological principle, 135, 261
Judicial Committee on, 261
law of, Protocol of 1967 relating to the Status of Refugees and: *see* Refugees
obligations under, 257–8
ratification: *see* Peace Treaty of Regensburg
validity, powers issued to agents and, 71, 86–8, 90: *see also* Peace Treaty of Regensburg

Ultra vires doctrine, 129–32, 137–8, 140–1, 143, 164, 166–7, 169, 174
international corporations, activities of, 164, 166–7, 169, 174
justiciability of disputes and, 129–32, 137–8, 140–1, 143
United Kingdom, Tokyo Convention Act of 1967: *see* Aircraft, crimes committed on board
United Nations, 39–70, 91–122, 124–5, 142, 181–3, 185–92, 194–7, 202–3, 209–19, 221, 279–81, 288
budget approval by the General Assembly, duty or discretion, 91–122
Administrative Tribunal, opinion of 1954, 112–16, 121
budget, contents of, 97–8
budget, cycle, 103–5
budgetary powers, activities of other organs and, 97–8, 106–22
budgetary powers, evidence of limitations, 92–4, 96–8, 101, 104–5, 113–116, 120–2
Charter, *travaux préparatoires*, Art. 17, 92–7, 120
Councils and G.A., attempts at coordination, 101–3
Councils' powers and, 101–2, 105
Councils' status and, 106–7
credits, transfer between sections of the budget, 116–17, 120
decisions, financial implications of, and rules of procedure, 99–106, 115–17, 120–1
Draft Charter, Art. 17, 96–7
Draft Constitution of 1943, 93
Dumbarton Oaks Proposals, 95–6
estimates, supplementary, for 1966, 116–22
Expenses of the U.N., opinion of 1962, 97–8, 111

United Nations (*cont.*)
budget approval by the General Assembly (*cont.*)
expenses, unforeseen and extraordinary, 105, 107–10, 116–19
finances of the Organization, future, G.A. powers, 121
Financial Regulations, 99–108 *passim*, 117, 120
good faith principle and, 122
I.C.J., expenses of, 107–8, 116–21
League of Nations Covenant and, 92–3
obligations already incurred, G.A. powers, 112–16, 121–2
Outline Plan of 1943, 94
peace-keeping activities and, 91, 108–9
principal organs, G.A.'s power to review decisions, 110–12, 120–1
Secretariat, appropriation for, 105, 108–10
Skeleton Charter, Art. 13, 95–6
Staff Charter of 1943, 93
voting procedure and, 94
Working Capital Fund, advance from and reimbursement, 119–20
Charter, Art. 17, 91–8, 120
administrative budget, 97–8
travaux préparatoires, 92–7, 120
Economic and Social Council, 106–7
General Assembly: *see subheading* budget approval, *above*
Outer Space, Declaration of Legal Principles . . ., 279–81, 288: *see also* Outer Space Treaty
political organs of, and justiciability of disputes, 124–5, 142
refugees, 39–70: *see also* Refugees
Convention relating to the Status of, 39–45, 49–51, 57–62, 64
Protocol relating to the Status of, 39–70
Security Council, 106–7, 181–3, 185–92, 194–7, 202–3, 209–19, 221
enforcement action by regional agencies and, 181–3, 185–92, 194–7, 202–3, 209–19, 221: *see also* Regional agencies
General Assembly's authority over, 106–7
treaties, U.N. practice in establishing, 50–7, 64–6: *see also* Refugees
Trusteeship Council, 106–7

United States of America, O.A.S., establishment and actions by: *see* Regional agencies

War, 230, 263
belligerent rights, unconditional surrender and, 263
military occupation, 263
Weapons of destruction in orbit, 288

PRINTED IN GREAT BRITAIN
AT THE UNIVERSITY PRESS, OXFORD
BY VIVIAN RIDLER
PRINTER TO THE UNIVERSITY

Date Due

NOV 2 5 1972		JAN 1 2 1976	
JAN 2 3 1975			
MAR 1 7 1975			
FEB 1976			

CAT. NO. 23 233 PRINTED IN U.S.A.

TRENT UNIVERSITY
0 1164 0091524 9

JX21 .B7 v.42 1967
The British year book of
international law.

125165

DATE	ISSUED TO

125165